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NOTES OF RECENT CASES.

Waller and Madhavan Nair, JJ. 25*th November*, 1925. — *Cr. A. No.* 338 *of* 1925.

Service of process—Rules relating to—If ultra vires—*Warrant of arrest—Signed not by Judge but by Deputy Nazir—Special authority—Proof of, unnecessary.*

The rules issued by the Madras High Court under R. O. C. No. 3848 of 1921, dated 25th August, 1924, relating to process service, do not purport to have been made under S. 122, Civil Procedure Code, and therefore cannot have the effect of amending the provisions of the Civil Procedure Code in that behalf.

If they were framed under S. 20 of the Court-Fees Act they would appear to be *ultra vires* as that section empowers the High Court to frame rules only in respect of process fees and the remuneration of the process service establishment.

Where a warrant of arrest issued under O. 21, R. 24 is not signed by the Judge himself, but only by the Deputy Nazir, it need not be proved that any special authority was given to the latter for so signing. A general authority to do so may be presumed. 27 C. W. N. 1042 followed.

A. V. Narayanaswami Aiyar for Accused.

The Public Prosecutor for the Crown.

T. S. V.

Spencer and Venkatasubba Rao, JJ. 25*th November*, 1925. — *A. S. No.* 56 *of* 1923.

Contract—Suretyship—What constitutes—Receipt of commission—Relationship of broker alone.

Where a person who brought about a contract of sale of goods was made liable also as surety by the Lower Court on the ground that he orally undertook to be responsible for performance and received a high commission, *held*, in appeal, that he was a mere broker and that mere recommendations at the time of entering into a contract will not be sufficient in law to found a suretyship. 27 M. L. J. 149 followed.

P. S. Narayanaswami Aiyar for Appellant.

A. Krishnaswami Aiyar and *P. S. Chandrasekara Aiyar* for Respondent.

T. S. V.

Spencer and Venkatasubba Rao, JJ.
25th November, 1925. — *A. S. No. 96 of 1923.*

Sale of goods—Description of goods in footnote—If an essential part of contract—Advance of purchase money—Refund—Person who commits breach, if can sue for.

Where a contract of sale contained in a footnote the description that the goods were those purchased from *B* who, in turn, purchased from the Madura Mills : *Held*, that the description was an essential part of the contract and that the tender of bales similar in quality though not purchased in the manner specified is not a valid tender. II A. C. 455 followed.

Quaere : Whether a person, who has paid an advance of purchase money, can sustain a suit for refund of the advance even though he is guilty of breach of contract.

K. Narasimha Aiyar for Appellant.

A. Krishnaswami Aiyar, P. S. Chandrasekara Aiyar and *P. S. Narayanaswami Aiyar* for Respondents.

T. S. V.

Devadoss, J.
26th November, 1925. — *S. A. No. 238 of 1925.*

Civil Procedure Code, S. 92—Hindu temple—Founder—Subscriptions collected—Right to give directions as to management—Removal of trustees—Mismanagement—Proof of—If essential—Powers of Court.

Where a person collects subscriptions from various persons and builds a temple, he has a right to direct in what manner

the institution should be managed and what rights the trustees should have. He is in the eye of law the founder, but the subscribers have a right to object to his arrangements if their original intention is not carried into effect by him. 50 Cal. 292; 10 A. C. 304; 43 E.R. 638 referred to. There is a presumption that the trust created by the founder is what the contributors intended to create.

When a scheme is framed under S. 92, C. P. Code, the Court has power to remove a trustee even without a finding that he has mismanaged the trust. The powers of the Court are wide and if the presence of a trustee is not conducive to the management of the institution, the Court has power to remove him. 4 L. W. 228; 43 Cal. 1085; 28 Mad. 319 referred to.

T. R. Ramachandra Aiyar and *S. R. Dikshit* for Appellants.

The Advocate-General and *K.S. Sankara Aiyar* for Respondents.

T. S. V.

The Chief Justice.
1st December, 1925. } *C. R. P. No.* 424 *of* 1924.

Madras Village Courts Act, 1889, *S.* 73—*Village Court decision reversed by Munsif on merits—Jurisdiction of Munsif.*

Where in a suit for recovery of money on accounts, a Village Court disbelieved the plaintiff's evidence and dismissed his claim, but, under S. 73 of the Village Courts Act, the Munsif reversed the decision as it was unjust as the plaintiff's evidence was clear and conclusive, *Held*, the Munsif had no jurisdiction to treat the matter as an appeal and reverse the decision on evidence. 21 Mad. 363 followed.

K. P. Ramakrishna Aiyar for Petitioner.

Respondent not represented.

T. S. V.

Waller and Madhavan Nair, JJ.
2nd December, 1925. } *C. R. P. No.* 940 *of* 1924.

Civil Procedure Code, O. 9—*Applicability—Suit dismissed for default—Application to set aside—Dismissal of, for default—Court if has power under O.* 9 *to set aside latter dismissal.*

On a suit being dismissed for default, an application was put in under O. 9 to set aside the dismissal. This application was itself dismissed for default, whereupon on an application being put in under O. 9 again to set aside this latter dismissal, the Court set it aside. *Held*, O. 9 was applicable and the Court had jurisdiction to set aside the second dismissal. Judgment of Phillips, J. in C. R. P. No. 1014 of 1924 followed.

Ch. Raghava Rao for Petitioner.

G. Lakshmanna for Respondent.

T. S. V.

Ramesam, J.
2nd December, 1925. } *S. A. No.* 559 *of* 1923.

Registration Act, S. 17 (2) (*v*)—*Co-owners—Agreement to divide properties—If requires registration—Implied undertaking to execute another document—Test—Amendment—Second Appeal—Mesne profits—Liability for.*

An agreement among co-owners to divide their properties even if it does not contain an express clause contemplating the execution of another document does not convey or create any right and as such does not require registration. In all such cases the carrying out of the agreement involves an implied undertaking to execute another document and the document is exempted from registration under S. 17 (2) (*v*) of the Registration Act. The true test is to see if the document by itself conveys title, when alone registration is necessary. 37 Mad. 480; 14 Mad. 55; 15 C.W.N. 375 ; 1 Lah. 134; 46 Mad. 373 referred to.

Held also that a prayer for executing the deed of transfer and division could be granted even in second appeal and that the defendants were liable for mesne profits.

M. Balasubramania Mudaliar for *A. Krishnaswami Aiyar* for Appellant.

K. Bhashyam Aiyangar for Respondents.

T. S. V.

Ramesam, J.
2nd December, 1925. } *S. A. No. 617 of 1923.*

Succession Certificate Act, S. 16—Certificate holder—Suit for debt—Plea of payment to legatee under will—If open—Will held genuine in later proceedings—Court if can take note of subsequent events.

A Hindu widow who had obtained a succession certificate in respect of debts due to her deceased husband sued a debtor and the latter pleaded discharge by payment to a legatee under a will of the deceased prior to the obtaining of the succession certificate. Subsequently in proceedings to which the widow was a party, the will was held to be genuine and the certificate granted was revoked later. *Held,* the plea of discharge was open to the debtor and S. 16 of the Succession Certificate Act was not a bar. *Held,* further, that a Court could take note of subsequent events. 8 Bom. H. C. 152 folld. ; 7 B. H. C. 31; (1918) M. W. N. 242 ; 12 M. L. J. 380 distd.

C. V. Anantakrishna Aiyar and *K. Venkateswara Aiyar* for Appellant.

K. Rajah Aiyar and *P. V. Krishnasami Aiyar* for Respondent.

T. S. V.

Wallace, J.
2nd December, 1925. } *C. M. S. A. No. 54 of 1924.*

Civil Procedure Code, S. 48—Decree—Execution—Attachment of decree debt—Execution petition dismissed for default—Application by judgment-debtor to execute his decree and deposit money to the credit of his decree-holder—Realisation of assets—Application by decree-holder to draw out moneys more than 12 years after decree—If barred.

A obtained a money decree against *B* on the 13th November, 1907. On 22nd November, 1916, he filed an execution petition and got an order attaching a decree which *B* had obtained against *C* on the file of another Court. Subsequently, *A's* petition was dismissed on 29th June, 1917, as not pressed and also because there was default in furnishing the correct address for service on *B*. *B*, however, was not permitted to execute his decree against *C*. *B* thereupon filed an application on 31st

January, 1918, to be appointed receiver for the execution of his decree against *C* and for permission to execute the said decree undertaking to deposit the proceeds into Court to the credit of *A's* suit. After notice to and with the consent of *A*, the Court ordered on 16th March, 1918, that *B* may execute his decree provided he deposited the money realised into Court. There was no order expressly appointing him receiver. *B's* decree was executed and assets were realised and paid into Court in 1921 to the credit of *A's* suit. *A* applied on 6th February, 1922, that the moneys should be sent for from the other Court and paid over towards his decree.

Held, that *A's* petition was in time, that S. 48 of the Civil Procedure Code had no application as the application was not a substantive application for the initiation of fresh proceedings but was one for payment out of moneys already deposited to the credit of the particular suit and that this result would follow even if *B* was not appointed receiver. 8 Cal. 89 and 48 M. L. J. 506 relied on.

Ch. Raghava Rao for Appellant.

V. Govindarajachari for Respondent.

T. S. V.

Waller and Madhavan Nair, JJ.
4th December, 1925. } Cr. R. C. No. 654 of 1925.

Criminal Procedure Code, S. 439 (4)—Finding of acquittal—Meaning of—Conviction under S. 307, Penal Code—Revision—High Court if can alter into one under S. 302, Penal Code.

The High Court has no power in revision to alter a conviction by the Lower Court for culpable homicide not amounting to murder falling under the latter part of S. 304, I. P. C., into one of murder or even of culpable homicide coming under the first part of S. 304 for to do so would amount to converting a finding of acquittal into one of conviction. The expression "finding of acquittal" in cl. 4 of S. 439, Cr. P. Code, is not limited only to cases of complete acquittal. 37 Mad. 119 dissented from. 44 All. 332 followed.

A. V. Narayanaswami Aiyar for Accused.

The Public Prosecutor for the Crown.

T. S. V.

The Chief Justice. }
4th December, 1925. } S. A. No. 898 of 1923.

Madras Estates Land Act, Ss. 112, 125—Defaulter—Who is—Registered pattadar—Notice of sale—Suit for declaration of title.

The term "defaulter" in S. 112 of the Madras Estates Land Act means only the registered pattadar and it is enough if the notice of sale is sent to him.

In a suit brought by the plaintiff as mortgagee decree-holder purchaser for the possession against a purchaser at a rent sale, *held*, he could not obtain any declaration as to his rights under S. 125 of the Estates Land Act.

P. S. Ramaswami Aiyangar for Appellant.

D. Ramaswamy Aiyangar for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ. }
7th December, 1925. } C. M. A. No. 270 of 1925.

Civil Procedure Code, S. 47—Power of execution—Pre-decree arrangement not to execute decree—If can be pleaded.

It is open to a judgment-debtor to plead in bar of an execution of a decree against him a pre-decree arrangement that the decree was not to be executed. 40 Mad. 233 (F. B.); 9 M. L. T. 464; 15 M. L. J. 370; 37 Mad. 541; 48 M. L. J. 277; folld. 19 Mad. 230; 43 Mad. 725; 35 M. L. J. 579; 14 L. W. 317; 17 L. W. 635 distd.

Per Wallace, J.—In such matters uniformity of procedure is what is required and a reference to a Full Bench is not necessary.

K. Bhashyam Aiyangar for Appellant.

T. R. Ramachandra Aiyar and *S. R. Dikshit* for Respondents.

T. S. V.

Krishnan, J. }
11th December, 1925. } Cr. Rev. Case No. 428 of 1925.

Criminal Procedure Code, S. 247—Absence of complainant when case was called—Presence of his vakil—Case dismissed—Appearance of complainant shortly after—Procedure.

After the prosecution evidence in a case had been closed the case was posted for defence evidence to another day at

7 A.M. The pleader for the complainant was present but the complainant was absent on the adjourned date. Soon after 8 o'clock the Magistrate took up the case and finding the complainant absent dismissed the case. The complainant turned up shortly after, but a little too late.

Held, in view of the fact that the case itself was posted to an unusual hour, 7 A.M., the Magistrate would have exercised a better discretion if he had given a short adjournment and not dismissed the case in the circumstances; and in such cases the High Court ought to interfere to set right matters as this Court alone has power to do so. 38 Mad. 1028 distinguished.

E. Krishna Aiyar for Petitioner.

J. C. Adam (*Public Prosecutor*) and *E. Krishnamurthy* for Respondents.

T. S. V.

Phillips and Odgers, JJ.
15th December, 1925. } *S. A. No.* 104 *of* 1923.

Mortgage—Prior and subsequent—Sub-mortgage by puisne mortgagee—Suit by sub-mortgagee—Representation of equity of redemption—Sale in execution—Title of purchaser.

T, the jenmi of the suit lands, granted it on *kanom* to *A*, and later created a simple mortgage in favour of *K*. *K* sub-mortgaged his right to *C*, who brought a suit on his sub-mortgage against *K* and the heirs of *T*, who had died meanwhile. The plaintiff who was the auction purchaser in execution under that decree sued to redeem the *kanom*. It subsequently transpired that even before *C's* suit, the equity of redemption had been sold in execution of a decree against *T* and purchased by *S*, though this fact was not known to *C*. The question arose whether the title of the plaintiff was perfect. *Held*, in *C's* suit the equity of redemption was not properly represented and the purchaser's title was therefore defective. 29 M. L. J. 698; 33 Mad. 6; 14 M. I. A. 605 distinguished.

A. Vasudeva Menon for Appellant.

K. P. Krishna Menon for *K. P. M. Menon* for Respondents.

T. S. V.

Madhavan Nair, J.
15th December, 1925.
C. M. S. A. No. 122 *of* 1925.

Limitation Act, Art. 180 *—Auction purchaser—Application for delivery—Dismissal of—Subsequent application—Limitation for.*

Where a sale of immoveable properties in execution of a money decree was confirmed and within three years of the date of confirmation an application for delivery of possession was put in but was dismissed as there was no one to take delivery, and a second application for delivery was put in within three years of the prior application but more than three years after the confirmation of the sale, *held*, it was barred under Art. 180, Limitation Act. Opinion of *Oldfield, J.* in 43 I. C. 155 ; C. M. S. A. No. 55 of 1925 followed.

K. Kameswara Rao for Appellant.

P. Satyanarayana Rao for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ.
16th December, 1925.
C. M. A. No. 98 *of* 1924.

Transfer of Property Act, S. 53*—Fraudulent transfer—Suit by Official Receiver—If maintainable.*

In respect of a fraudulent transfer made by a person who subsequently becomes insolvent, the Official Receiver can maintain a suit under S. 53, T. P. Act, to set aside the same.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

T. S. V.

Chief Justice and Ramesam, J.
16th December, 1925.
O. S. A. No. 108 *of* 1925.

Letters Patent (Madras), cl. 15*—Order under O.* 1, *R.* 10 *transposing certain defendants as plaintiffs—If a judgment—Appeal.*

In a suit for declaring certain properties to be trust properties for charitable purposes, and that the plaintiffs and defendants were entitled to manage the same or in the alternative for declaring them to be joint family properties liable to partition, one of the plaintiffs died and another became

insolvent. Thereupon two of the defendants were transposed as plaintiffs under O. 1, R. 10. In an appeal by the Official Assignee against the order of transposition, *held*, the order did not amount to a judgment within the meaning of cl. 15 of the Letters Patent and was not appealable. 35 Mad. 1 referred to.

K. S. Narayana Aiyangar for *Messrs. Grant and Greatorex* for Appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Respondent.

T. S. V.

Devadoss and Wallace, JJ.
17th December, 1925. } *C. R. P. No.* 554 *of* 1925.

Insolvency—Powers of Court to review its own orders—Provincial Insolvency Act, S. 5—Creditor who has tendered proof of debt—Person aggrieved.

A person who was adjudged insolvent was directed to apply for discharge within a certain time, but as he failed to do so the order of adjudication was annulled. Thereupon two creditors who had already tendered proof of their debts applied to the Court to review the order of annulment. *Held*, under S. 5 of the Provincial Insolvency Act the Insolvency Court had the same powers as any ordinary Civil Court and therefore it had power to review its own order under O. 47, C. P. Code. 46 Mad. 405; 44 All. 606 followed; 19 L. W. 418 distinguished.

A creditor who has already tendered proof of his debt is a "person aggrieved" within the meaning of the Insolvency Act. 1 Manson 161; 11 Ch. D. 56 referred to.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Petitioners.

Respondents not represented.

T. S. V.

Devadoss and Waller, JJ.
17th December, 1925. } *Cr. A. No.* 339 *of* 1925.

Planters Labour Act (Madras Act I of 1903), *Ss.* 4, 7, 13, 32 *—Rules framed under—Rule* 2 (4)*—Mandatory, nature of—Omission to give descriptive marks in labour contract—Effect of—Criminal statute—Interpretation of.*

The rules framed by the Madras Government under the Planters' Labour Act are mandatory in their nature and must be

strictly followed. A labour contract made in contravention of any of the rules (*e. g.*, omitting to give the descriptive marks of the labourer) is not legally enforceable. Provisions of Statutes which impose penalties should be strictly construed and a person could be held criminally liable only if all the provisions are strictly complied with.

The Public Prosecutor (*J. C. Adam*) for the Crown.

T. A. Ananta Aiyar for Accused.

T. S. V.

Spencer, J.
4*th January*, 1926. } S. *A. No.* 434 *of* 1923.

Limitation Act, Art. 137—*Applicability—Mortgage decree—Suit for possession by purchaser at sale.*

Art. 137 of the Limitation Act is inapplicable to suits for possession by the auction purchaser at a sale in execution of a mortgage decree.

K. S. Jayarama Aiyar for Appellant.

K. V. Krishnaswami Aiyar and *P. N. Appusami Aiyar* for Respondent.

T. S. V.

Odgers, J.
5*th January*, 1926. } S. *A. No.* 1473 *of* 1923.

Madras Estates Land Act, Schedule Part A, No. 8—*Suit for rent—Limitation—Final decision in suit for enforcement of patta—Amount of rent ascertained—Effect of.*

A suit in a Revenue Court for arrears of rent filed under the Madras Estates Land Act more than three years after the rent fell due but less than 3 years after the final decision in a suit for enforcement of patta is nevertheless barred by limitation, where the rate of rent had been ascertained in a declaratory suit between the parties in a prior litigation. 27 Mad. 143 (P. C.) explained and distinguished. Art. 8 in Part A of the Schedule to the Estates Land Act construed.

S. Varadachari and *E. Vinayaka Rao* for Appellant.

T. V. Venkatrama Aiyar and *K. Ramachandra Aiyar* for Respondent.

T. S. V.

Odgers, J.
5th January, 1926. } S. A. No. 972 of 1924.

Madras Survey and Boundaries Act, S. 20—Apportionment of costs—Proprietor and tenant—Absence of notice to tenant—Official acts—Presumption of regularity.

The decision of a Survey Officer apportioning the costs of the survey as between the proprietor and his tenants under S. 20 is binding on the latter even though they had no notice of the proceedings. The proceedings under Chapter III of the Survey and Boundaries Act are between the Government and the proprietor and the tenants are not primarily parties thereto.

Where the rules framed under the Act provided that the mode of apportionment should be determined by the Collector after communication with the Survey Officer, but there was no specific evidence of consultation, *held*, there was the presumption of regularity as regards official acts, and it was for the tenants who challenged the acts to prove absence of consultation. 20 Bom. 732 followed.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellants.

A. Krishnaswami Aiyar and *T. L. Venkatrama Aiyar* for Respondent.

T. S. V.

Phillips, J.
5th January, 1926. } S. A. No. 1147 of 1922.

Company—Directors—Dispensing with services of Secretary—Resolution of shareholders cancelling Subsequent resolution rescinding prior resolution—Notice—Absence of—Effect—Outsider if can question—Function of Court.

The Directors of a limited Company registered under the Indian Companies Act dispensed with the services of a Secretary after due notice. The shareholders passed a resolution at a meeting cancelling the order of the Directors, but on a later date to which the meeting was adjourned, rescinded their previous resolution. The Secretary sued the Company for damages and for restoration to office on the ground that the later resolution of the shareholders was invalid, as no proper notice of the resolution had been given. *Held*, it was open to the shareholders to rectify any irregularity such as want of notice, and by acting on the later resolution had in effect rectified the

defect in procedure ; (2) any such irregularity could be questioned only by the shareholders and not by an outsider, and (3) that Civil Courts will not ordinarily interfere with the internal management of a Company. (1921) 3 K. B. 32 ; 31 Ch. D. 211 ; 37 Ch. D. 1 ; 1 Ch. D. 13 referred to.

P. S. Chandrasekharan for *A. Krishnaswami Aiyar* for Appellant.

B. Sitarama Rao and *T. Appaji Rao* for Respondent.

T. S. V.

Phillips, J.
5th January, 1926. } *S A. No.* 938 *of* 1923.

Jurisdiction—Undervaluation—Appeal to District Court—No objection raised—Decree—If can be challenged in collateral proceedings—Insolvency—Fraudulent alienation—Suit for declaration—Leave of Court—Failure to obtain—Effect.

Where owing to undervaluation an appeal is presented to a District Court instead of the High Court, but no objection is raised at the hearing of the appeal, the decree passed therein cannot be vacated by collateral proceedings as being without jurisdiction. 47 M. L. J. 448 followed.

A person made a fraudulent alienation of his properties and then became insolvent. A creditor against whom an order was passed in claim proceedings when he attached the properties sued to set aside the order and obtain a declaration that the alienation was fraudulent. *Held,* the suit should be filed only after obtaining the leave of the Insolvency Court. Where, however, the suit is instituted without such leave and is decreed without anybody raising the objection, the decree is final and cannot be impeached in separate proceedings.

T. M. Krishnaswami Aiyar and *B. C. Seshachela Aiyar* for Appellant.

B. Somayya for Respondents.

T. S. V.

Devadoss and Waller, JJ.
6th January, 1926. } *Cr. A. No.* 594 *of* 1925.

Madras Criminal Rules of Practice, R. 238 - *Criminal trial—Joint charge—Robbery and murder—Misdirection—Conviction under S.* 404, *I. P. C.—Validity of.*

An accused was tried for offences under Ss. 392 and 302, I. P. C., at a sessions trial before the same persons acting as jurors for the one offence and as assessors for the other. *Held*, the joint charge was opposed to R. 238 of the Madras Criminal Rules of Practice.

In a charge for robbery, a direction to the jury that if they found that the accused removed articles from the body of the dead person after the death of that person, they could find him guilty under S. 404, I. P. C., amounts to a misdirection and a conviction for such an offence cannot be sustained.

T. S. Viswanatha Aiyar for Appellant.

The Public Prosecutor (J. C. Adam) for the Crown.

T. S. V.

Spencer and Venkatasubba Rao, JJ. *6th January, 1926.* } *A. S. No. 334 of 1922.*

Hindu Law—Adoption—Consent given to widow by bandhu—If sufficient—Father's sister's son's daughter's son—If a heritable bandhu—Fees Rules, R. 41 (1)—Special fee.

In the Dravida country, the consent of a *bandhu* who is the nearest reversionary heir is sufficient to enable a Hindu widow to make a valid adoption. 43 Mad. 650 and the view of Jackson, J. in 20 L. W. 503 dissented from ; decision of Ramesam, J., in 20 L. W. 503 approved.

A father's sister's son's daughter's son of the propositus is a heritable *bandhu* and the rule of exclusion enunciated by Dr. Sarvadhikari keeping out of the line of inheritance claimants in case the propositus is not the line of their maternal grandfather or father or mother is not warranted by the Mitakshara. As the claimant and the propositus were within 5 degrees of the common ancestor, the claimant is a heritable *bandhu*. Case-law elaborately discussed.

In view of the important and difficult questions of law involved their Lordships fixed a special fee under R. 41 (1) of the Fees Rules.

A. Krishnaswami Aiyar and *W. Kothandaramayya* for Appellant.

The Government Pleader for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ.
7th January, 1926.

C. M. A. No. 364 of 1925.

Provincial Insolvency Act (V of 1920), S. 53—Order under—Individual creditor—If a person aggrieved within S. 75—Right of appeal—Creditor not a party to proceedings—Effect of.

An order under S. 53 of the Provincial Insolvency Act can be appealed against by a creditor, though he was not *co nomine* a party to the proceedings, as he is represented by the Official Receiver.

Per Wallace, J.—The general policy of the law of Insolvency is that a single creditor cannot act in such a case, but it is only the Official Receiver that can act, unless there is a conflict of interest. S. 75 does not give a wider right when his interests are homogeneous with those of the general body of creditors and not opposed to it. But if the single creditor indicates that he is appealing on behalf of the body of creditors, the appeal is competent.

Per Madhavan Nair, J.—The creditor even if he is not a party to the order, can appeal if he is bound by the order and is aggrieved thereby.

Case-law fully discussed.

L. A. Govindaraghava Aiyar for Appellant.

T.R. Ramachandra Aiyar and *S.R. Dikshit* for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ.
7th January, 1926.

L. P. A. No. 32 of 1925.

Res judicata—*Mortgage—Final decree for sale—Not executed—Suit for redemption—If barred.*

Where a usufructuary mortgagee filed a suit for sale based on a covenant contained in the mortgage deed and obtained a final decree, the mortgagor not having redeemed within the time fixed in the preliminary decree, but did not execute the decree for sale, a subsequent suit by the mortgagor for redemption is barred by *res judicata.* 25 Mad. 300 (F.B.); 39 Mad. 896 followed. The substantive rights of the parties have not in any way been affected by the changes made consequent on the provisions of the Transfer of Property Act being transposed to the C. P. Code, 1908.

Decision of Devadoss, J. reported in 86 I. C. 527 reversed.

T. L. Venkatrama Aiyar for Appellant.

C. S. Venkatachari for Respondent.

T. S. V.

Odgers, J.
8th January, 1926. } *S. A. No.* 886 *of* 1923.

Transfer of Property Act, S. 116—*Assent to continuing in possession—What amounts to.*

A lessee of the suit properties sub-leased it to another. The landlord after terminating the lease called upon the sub-lessee to deliver possession to hold it at an increased rent. *Held*, the act of the landlord was not an assent to the sub-lessee continuing in possession within the meaning of S. 116, T. P. Act, and in spite of the notice the position of the latter is that of a trespasser.

Under S. 116 the assent of the landlord alone is sufficient to convert a lessee holding over into a tenant. 48 Bom. 341 followed.

T. L. Venkatrama Aiyar for Appellant.

A. Sundaram and *P. G. Krishna Aiyar* for Respondent.

T. S. V.

Spencer, J.
8th January, 1926. } *S. A. No.* 983 *of* 1923.

Hindu Law—Widow—Power to sell—Purchase of more profitable property—Benefit and necessity.

A Hindu widow is competent to sell property inherited from her husband in order to purchase better and more profitable property. The test of benefit laid down by the decisions is distinct and different from the test of necessity. 40 Mad. 109 (P. C.), (1912) M. W. N. 546 followed. 14 L. W. 495, 25 M. L. J. 563 distinguished.

G. Lakshmanna for Appellant.

Ch. Raghava Rao for Respondent.

T. S. V.

Spencer, J.
7th January, 1926. } S. A. No. 892 *of* 1923.

Malabar Law—Kanom—Hypothecation by kanomdar—Redemption by jenmi without notice of hypothecation—If suit maintainable by hypothecatee against jenmi and his property.

Where a jenmi had granted a kanom and the kanomdar had executed a hypothecation of his rights to the plaintiff, and the jenmi redeemed the kanomdar without notice of the hypothecation, and the plaintiff brought the present suit to enforce the hypothecation against the jenmi and his property :

Held, the suit is not maintainable as the redemption of the kanom must be held to have extinguished the hypothecation as against the jenmi. (1917) M. W. N. 111 followed, S. A. No. 668 of 1921 and 43 A. 469 distinguished.

K. P. Ramakrishna Aiyar for Appellant.

K. P. Krishna Menon for Respondent.

T. S. V.

Devadoss and Waller, JJ.
8th and 11th Jan. 1926. } *Cr. A. No.* 551 *of* 1925.

Criminal Procedure Code, S. 190—Offence under S. 211, Indian Penal Code—Non-cognizable—Police investigating and charging accused—Committal to Sessions—Acquittal—Procedure.

The Police investigated a non-cognizable offence under S. 211, Indian Penal Code, and charged the accused before a Magistrate who committed him to the Sessions. The Sessions Judge relying on (1925) M. W. N. 317 acquitted the accused on the ground that the proceedings before the Magistrate were illegal. *Held*, per *Devadoss, J.*, the proceedings were illegal as the Police report or charge-sheet in a non-cognizable case would not fall under S. 190, Criminal Procedure Code. The order of acquittal was wrong, and the Sessions Judge ought to have sent up the case to the High Court to have the commitment quashed.

Per Waller, J.—The Police report would fall under one or other of the clauses of S. 190 and the accused should be retried.

Papers directed to be placed before a third Judge on account of the difference of opinion.

N R C

The Public Prosecutor (J. C. Adam) for the Crown.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for Accused.

T. S. V.

The Chief Justice,
Krishnan and Beasley, JJ.
11th January, 1926.

R. C. No. 11 of 1925.

Income-tax Act (XI of 1922), S. 4 (3) (i)—Trustees of charity—Utilising funds for carrying on rice business—Profits—If exempted.

Where the trustees of a charity (*Thevara Patasala*) utilised trust funds for carrying on a rice mill business, the profits derived therefrom are assessable to income-tax and do not fall under the exemption in S. 4 (3) (*i*).

M. Patanjali Sastri for the Commissioner of Income-tax.

V. Ramaswami Aiyar for Assessee.

T. S. V.

The Chief Justice,
Krishnan and Beasley, JJ.
12th January, 1926.

R. C. No. 9 of 1925.

Income-tax Act (XI of 1922), S. 66—Statement of case to High Court—Fee of one hundred rupees—Time for payment—Power of Commissioner to extend time for payment—Discretion if exists—Limitation Act, S. 5—Applicability.

The case of four assessees having been disposed of by the Assistant Commissioner of Income-tax by one judgment followed by separate demand notices in respect of each, they put in one joint application accompanied by a fee of one hundred rupees to the Commissioner for stating a case to the High Court. He directed them to put in four applications with four sets of fees or to amend the application by restricting it to any one particular assessee. They elected to do the former, but by the time they paid the fee the period of one month prescribed by the section had expired. *Held,* the Commissioner had no power to extend the time, as S. 5 of the Limitation Act did not apply to the periods of limitation prescribed by special laws.

M. Patanjali Sastri for the Commissioner of Income-tax.

T. Ramachandra Rao for the Assessee.

T. S. V.

The Chief Justice,
Krishnan and Beasley, JJ.
15th January, 1926.

A. S. No. 226 of 1924.

Transfer of Property Act, S. 84—Mortgagor depositing money in Court—Refusal of mortgagee to accept—Subsequent withdrawal by mortgagor—Interest—If ceases to run—Mortgagee—What to prove.

Where a mortgagor deposited the amount due to the mortgagee in Court, but the latter refused to accept it and thereupon after some time drew the money out with the permission of Court, the mortgagee if he claims interest has the burden of proof on him to show that thereafter the mortgagor was not ever ready and willing to perform his duty, *i.e.*, to pay the money due under the mortgage. Deposit in Court is only a form of tender and the question whether interest ceases to run depends on the facts proved and is a matter to be decided on evidence. The view laid down in 35 Mad. 44 that interest does not cease to run at all has been stated too broadly.

K. S. Krishnaswami Aiyangar for Appellant.

K. Rajah Aiyar and *N. S. Srinivasa Aiyar* for Respondent.

T. S. V.

The Chief Justice,
Krishnan and Beasley, JJ.
18th January, 1926.

O. S. A. No. 47 of 1924.

Presidency Towns Insolvency Act, S. 8 (2)—Person aggrieved—Insolvent if one—Appeal by, not competent.

Properties of a person whose estate had vested in the Official Assignee were sold by public auction. The insolvent raised objections to the sale, but the Judge sitting in Insolvency confirmed the sale, whereupon the insolvent appealed against the order. *Held*, he was not a person aggrieved within the meaning of S. 8 (2) of Act III of 1909 and hence the appeal was incompetent. 41 All. 243; 10 Ch. D. 388, 434 followed.

P. R. Srinivasa Aiyangar and *A. Rajagopala Aiyar* for Appellant.

M. S. Venkatrama Aiyar for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
19th January, 1926.

C. M. A. No. 361 *of* 1924.

Estoppel—Mortgagor and mortgagee—Sale by mortgagor's legal representative—Portion of consideration reserved with vendee for paying off mortgage—Vendee cannot deny consideration for mortgage.

The widow of a mortgagor sold the properties to a third party and the recitals in the sale deed showed that a portion of the purchase money was kept with the vendee for paying off the mortgage debt. In a suit by the mortgagee to recover the money due to him, the vendee pleaded that there was no consideration for the mortgage. *Held,* he was estopped from putting forward such a plea. 31 Ch. D. 151; 11 Halsbury 371; 40 C. L. J. 67 referred to.

T. V. Muthukrishna Aiyar and *V. Subramania Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *N. Swaminatha Aiyar* for Respondent.

T. S. V.

Spencer and Odgers, JJ.
19th January, 1926.

S. A. No. 918 *of* 1923.

Hindu Law—Inheritance—Maternal grandfather giving properties to grandson—Nature of estate taken—Death of grandson—If passes to widow or father who is joint.

A Hindu who had obtained properties under the will of his maternal grandfather died issueless leaving a widow and a father with whom he had been joint all along.

Held, the property obtained under the will was not "ancestral" property for the purpose of giving the father rights of survivorship, but would go in the first instance to the widow. 25 Mad. 678 referred to.

L. Venkatanarasiah for Appellant.

T. R. Vijayaraghavachariar for Respondent.

T. S. V.

Devadoss and Waller, JJ.
20th January, 1926.
Cr. R. C. No. 503 *of* 1925.

Madras District Municipalities Act (*V of* 1920), *Ss.* 249, 250 *and Sch. V, cl.* (*q*)—*Rice-hulling machine—Permission granted by Municipal Council for construction—Annual license, if necessary—Machinery—If necessarily to be dangerous—Construction of Sch. V, cl.* (*q*).

A person obtained the permission of a Municipal Council under S. 250 of the Madras District Municipalities Act for constructing and establishing a work-place and setting up a rice-huller driven by an oil engine, and began to work it without obtaining the annual licenses prescribed by S. 249. He was thereupon prosecuted under Ss. 249 and 338 of the Act. *Held*, the license under S. 249 was not necessary after taking out the permit under S. 250 and the rice-huller did not come under cl. (*q*) of Sch. V.

Clause (*q*) of Sch. V construed; 45 M. L. J. 555 approved in part and disapproved as to part.

F. S. Vaz and *T. S. Viswanatha Aiyar* for Petitioner.

T. Rangachariar and *S. T. Srinivasagopalachari* for Respondent.

The Public Prosecutor (*J. C. Adam*) for the Crown.

[Their Lordships applied the conclusions in the above to a similar case arising under Ss. 193, 207 and 221 of the Madras Local Boards Act (XIV of 1920) in Cr. R. C. No. 574 of 1925.]

T. S. V.

Devadoss and Waller, JJ.
20th January, 1926.
L. P. A. No. 176 *of* 1924.

Limitation Act, Arts. 137, 138—*Mortgage pending attachment—Auction purchaser Suit for redeeming mortgagee in possession—Limitation period—Rights of purchaser—How affected by mortgage—C. P. Code, S.* 64.

During the pendency of an attachment by a decree-holder, the judgment-debtor usufructuarily mortgaged the properties for a period of 5 years on 15th June, 1891, and put the mortgagee in possession. The same property was purchased at Court auction on 13th July, 1891, by the predecessor-in-title of the plaintiff at a sale held in execution of the decree obtained by the decree-holder, and the sale was confirmed on 14th October, 1891. The plaintiff sued the usufructuary mortgagee in possession for redemption in 1918. *Held*, (1) though the rights of the auction purchaser were not affected by the mortgage pending attachment, the suit was barred under the 12 years' period of limitation; and (2) where the purchaser's claim is

barred against the judgment-debtor, it is equally barred against any other person deriving title from him. 7 Cal. 107 (P. C); 28 I. C. 241; 17 L. W. 680 referred to; 44 Bom. 614; 44 Mad. 946 distinguished. Scope of S 64, C. P. Code and its effect with respect to the usufructuary mortgage discussed.

Decision of Madhavan Nair, J. reported in 47 M. L. J. 913 affirmed.

K. Bashyam Aiyangar for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

T. S. V.

Odgers, J.
20th January, 1926. } *S. A. No.* 548 *of* 1924.

Contract—Sale of land—Guardian of minor—Avoidance of—Repudiation—Acceptance necessary.

A contract cannot be put an end to by repudiation by one party unless such repudiation is accepted by the other party also.

A contract for sale of land entered into by a guardian on behalf of a minor cannot be avoided on the ground of the subsequent offer of a higher price by a third party.

Sir K. V. Reddy and *P. V. Rangaram* for Appellants.

Ch. Raghava Rao for Respondents.

T. S. V.

Waller, J.
21st January, 1926. } *C. R. P. No.* 366 *of* 1924.

Indian Contract Act, S. 30—*Chit fund—If a lottery—Suit for recovering subscriptions paid—If maintainable.*

A chit fund was started with 500 subscribers, each subscribing two rupees per month. At the end of each month a chit was drawn by lot, and the winner was paid Rs. 100 and thereafter his connection with the chit ceased. The drawings were to continue for 50 months and at the end thereof, each subscriber who had not by then got a prize was to receive the whole subscription he had paid. After some months, the drawings were suddenly stopped by the stakeholder and one of the subscribers sued for recovering the amounts he had paid and the question arose whether the transaction was a lottery, embodying a wagering agreement. In view of the conflict of opinion in the Madras High Court evidenced by 21 L. W. 403 (decided by Ramesam and Venkatasubba Rao, JJ.) and 49 M. L. J. 791 (decided by Spencer and Madhavan Nair, JJ.)

Mr. Justice Waller directed the papers to be placed before the Chief Justice for being referred to a Full Bench.

A. V. Narayanaswami Aiyar for Petitioner.

S. R. Muthuswami Aiyar for Respondent.

T. S. V.

Wallace, J.
21st January, 1926. } *Cr. R. C. No.* 310 *of* 1925.

Criminal Procedure Code, S. 197—Complaint against a Sub-Registrar—False alteration of a document presented for registration—If requires sanction of Government.

A complaint against a Sub-Registrar that he falsely altered the contents of a document presented to him for registration does not require the sanction of Government under S. 197, Cr. P. Code, as it is not done by him in the discharge of his duty.

P. N. Marthandam Pillai for Petitioner.

K. P. Ramakrishna Aiyar and *C. L. Nilakanta Mudaliar* for Respondent.

T. S. V.

Spencer and Odgers, JJ.
22nd January, 1926. } *S. A. No.* 1099, *etc., of* 1921.

Civil Procedure Code, S. 100—Mokhasa village in a Zemindari—If an estate within S. 3 (2) of the Estates Land Act—Land if excluded from assets of zemindari—Question of fact—Suit in Civil Court to eject tenants—Jurisdiction if barred—Record of Circuit Committee—Evidentiary value of.

A suit was filed in a Civil Court by *mokhasadars* of a village situate within a permanently-settled Zemindari to eject their tenants and the latter pleaded that S. 189 of the Madras Estates Land Act was a bar to the maintainability of the suit in Civil Courts. The Courts below held that the village was not an estate and in that view assumed jurisdiction to try the suit. *Held,* though the question whether lands situate within a *Zemindari* were excluded from the assets at the time of the Permanent Settlement may resemble one of fact, as the jurisdiction of the Civil Courts depended on a correct decision of the question, the matter can be gone into in second appeal. No Court can confer jurisdiction on itself by wrongly deciding the facts necessary to be proved in order to determine a question of jurisdiction.

Considerations for determining whether a *mokhasa* village within a Zemindari was an estate or not and the evidentiary

value of the Taylor's Report and Record of the Circuit Committee discussed.

A. Krishnaswami Aiyar and *P. Bapiraju* for Appellants.

V. Ramadoss and *K. Venkatrama Raju* for Respondent.

T. S. V.

Krishnan and Venkatasubba Rao, JJ.
22nd January, 1926. — *A. S. No.* 185 *of* 1922.

*Hindu Law—Minor—*De facto *guardian—Acts if binding—Universal donee—How far bound by acts of donor.*

De facto guardianship is well recognised in Hindu Law and the acts of a *de facto* guardian in excess of his powers are only voidable. They are capable of affirmance by the minor on attaining majority.

Quaere: Whether a universal donee is bound by an acknowledgment or renewal made by the donor after the donation of a debt in existence at the time of the donation ?

A. Krishnaswami Aiyar and *Ch. Raghava Rao* for Appellant.

S. *Varadachari*, *A. Sundaram Aiyar* and *S. Subramania Sastri* for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
27th January, 1926. — *C. M. A. No.* 167 *of* 1924.

Arbitration—Award—Matters not referred to—Jurisdiction to decide on—Personal knowledge—Importation of—Effect.

Where disputes between parties are referred to arbitration, the arbitrators have no jurisdiction to give a decision including matters which are not included in the reference. The fact that they genuinely believed that the matters decided fell within the scope of the reference will not make the award valid. 31 Bom. 1 followed.

An award must be based on the evidence placed before the arbitrators and not on their personal knowledge ; in the latter case, it amounts to misconduct and the award is vitiated thereby. 44 M. L. J. 263 ; 49 M. L. J. 115 followed ; 3 Rang. 387 dissented from.

T. V. Venkatrama Aiyar and *T. V. Ramanatha Aiyar* for Appellant.

Ch. Raghava Rao for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
27th January, 1926. — *C. M. A. No.* 150 *of* 1924.

Limitation Act, Art. 182 (4)—*Amendment of decree—Date of order—Amendment carried out later—Limitation when commences*

An execution application was presented more than 3 years after the date of the order of a Court amending the decree as regards payment of costs to a party whose name was omitted to be included in the original decree, but within three years after the amendment was actually carried out. *Held*, for purposes of Art. 182 (4) the date when the order of amendment was passed must be taken to be "the date of amendment" and the application was barred. 36 I. C. 533 referred to.

Rangaswami Aiyangar for *K.R. Narayanaswami Aiyar* for Appellant.

L. Venkatanarasiah for Respondent.

T. S. V.

Wallace, J.
27th January, 1926. — *Cr. R. C. No.* 249 *of* 1925.

Criminal Procedure Code, S. 488—*Maintenance of illegitimate child—Paternity denied—Mother's statement on oath—Independent corroboration—Entry in Municipal record—If amounts to.*

In proceedings under S.488, Criminal Procedure Code, for the maintenance of an illegitimate child, where the mother states on oath that the respondent is the father of the child and he denies the same, Courts cannot act on her statement unless there is independent corroboration of the same. An entry in the Municipal Register of Births relating to paternity based on the statement of the mother is not sufficient corroboration for this purpose.

Nugent Grant and *V.P. Nambiar* for Petitioner.

The Crown Prosecutor and *D. Kulandai* for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
28th January, 1926. — *C. M. A. No.* 251 *of* 1924.

Contract Act, S. 74—*Penalty—Creditor agreeing to remit portion of debt—Payment by instalments—Default—Entire amount to become due—If penal.*

Where a creditor agrees to remit a portion of the debt admitted due to him on condition of the balance being paid in instalments but stipulates that in default of payment of any instalment, the entire amount including the portion remitted should become payable, the stipulation is not by way of penalty and can be fully enforced. 2 I. C. 850 ; 48 Cal. 1036 followed.

P. Somasundaram for Appellant.

G. Lakshmanna for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
29th January, 1926.

C. M. S. A. No. 5 *of* 1924.

Civil Procedure Code, Ss. 42, 48 *and O.* 21, *R.* 16—*Decree transferred for execution—Assignee decree-holder—Application for recognition made to executing Court—Return for presentation—Appeal against order--Dismissal—Finality of—Application under* O. 21, *R.* 16 *to Court which passed decree more than* 12 *years after decree—If barred—Limitation Act,* S. 29 (2)—*Effect of.*

A decree was passed by the Salem Munsiff's Court on 9th January, 1909, and transferred to the Tirupattur Court for execution. There were various steps in execution taken keeping it alive till it was transferred to the respondent on 9th December, 1920, and he applied for execution under O.21, R.16 to the Tirupattur Court on 10th December, 1920. That Court decided it had no jurisdiction to entertain the application and returned it for presentation to the proper Court, and the order was confirmed on appeal. Meanwhile the assignee decree-holder had also applied to the Salem Munsiff's Court on 7th February, 1921, for recognition of the assignment in his favour. *Held,* (1) the application being more than 12 years after the date of the decree was barred under S. 48, Civil Procedure Code; (2) the order of the Tirupattur Munsiff's Court returning the application for presentation having been confirmed in appeal was final as between the parties and could not be attacked in the proceedings in the Salem Court and on appeal arising therefrom (1917) M. W. N. 318 distinguished; (3) the order returning the application was proper as under the law such an application could be entertained only by the Court which passed the decree. 27 Cal. 488; 39 Mad. 640 followed; 13 C. W. N. 533 dissented from; and the question being one of procedure, the principle of *stare decisis* will apply; and (4) the assignee decree-holder could not claim a deduction of the time spent in the Tirupattur Court and on appeal therefrom under Ss. 14 and 15 of the Limitation Act, as the execution application was put in long prior to the coming into force of the Limitation Amendment Act (X of 1922).

B. Somayya for Appellant.

R. Ganapati Aiyar for *K. Rajah Aiyar* for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
29th January, 1926.

C. M. A. No. 243 *of* 1924.

Civil Procedure Code, S. 92—*Scheme suit—Decree declaring archakas' right to monthly pay—Application to Court for pay—If competent—Appeal if lies—Order of Court directing payment—Jurisdiction—Civil Procedure Code,* S. 115—*Interference.*

A decree passed in a scheme suit relating to a temple declared that the *archakas* were entitled to a monthly salary at a certain fixed rate. They applied to the Court for directing the trustees to pay a certain amount as arrears of pay and the Court granted the same. *Held*, in an appeal by the trustees, (1) the appeal was incompetent; and (2) the petition by the *archakas* was itself not competent as the scheme decree was merely declaratory and rights thereunder could be enforced only by suit, and hence as the Court had no jurisdiction to pass the order, it should be set aside under S. 115, Civil Procedure Code. 2 L. W. 607 ; 2 M. L. T. 94 followed.

P. Satyanarayana Rao for Appellant.

B. Somayya for Respondent.

T. S. V.

Devadoss and Waller, JJ.
29th January, 1926.
C. M. P. No. 4292 *of* 1925.

Civil Procedure Code, S. 152—*Powers under—Amendment.*

Where a plot of land was described by a wrong survey number in the plaint and the mistake was repeated in the decrees passed in the Trial Court and in appeal, but was found out only when the decree passed by the High Court in second appeal was being executed, *held* the mistake could be rectified by the Court under S. 152 on an application for amendment.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Petitioner.

K. P. Ramakrishna Aiyar for Respondent.

T. S. V.

Devadoss and Waller, JJ.
1st February, 1926.
Cr. A. No. 546 *of* 1925.

Madras Children Act (*IV of* 1920), *S.* 26—*Offence punishable with fine—Offence under S.* 326, *Indian Penal Code.*

An offence under S. 326, Indian Penal Code, is an offence punishable with fine within the meaning of S. 26 of the Madras Children Act and where the accused is less than 16 years of age, the Court has power to order the parent to pay a fine rather than to sentence the accused to imprisonment.

Nugent Grant and *V. L. Ethiraj* for Appellant.

The Public Prosecutor for the Crown.

T. S. V.

Devadoss and Waller, JJ.
1st February, 1926.

Cr. R. C. No. 536 *of* 1925.

Madras Forest Act (*V of* 1882), *S.* 21 (*d*)—*Permitting cattle to trespass—Owner when liable to conviction—Knowledge necessary—Burden of proof.*

Where cattle belonging to a person are found trespassing on a reserved forest, the owner cannot be convicted under S. 21 (*d*) for permitting cattle to trespass merely because of the fact of such trespass. It must be proved that the act of trespass was done with the knowledge of the owner. The initial onus in such a case is not on him to prove that the act was done without his knowledge. 1 Weir 542 followed; 98 E. R. 411 distinguished; observation in 15 Mad. 156 as to the duty of the prosecution to prove overt acts on the part of the owner dissented from.

B. Jagannatha Doss for Petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Devadoss and Waller, JJ.
1st February, 1926.

S. A. No. 270 *of* 1925.

Appeal—Respondent originally minor—Attaining majority—Application to declare him major if necessary—Batch of appeals—Same parties—If separate applications necessary.

Where the respondent in an appeal is a minor represented by guardian, and during the pendency of the appeal he becomes a major, an application supported by affidavit must be put in before the respondent can be declared major and the guardian removed. In a batch of appeals between the same parties, separate applications must be filed in each appeal to have a minor-respondent declared a major.

K. Venkateswaran for Appellant.

T. S. V.

Ramesam and Venkatasubba Rao, JJ.
2nd February, 1926.

S. A. No. 1559 *of* 1922.

Hindu Law—Alienation by daughter—Estate of father—No recital of necessity—Decree—Sale proclamation reciting legal necessity and absolute interest being up for sale—Recital if evidence of necessity—Ancient alienations—Rules as to.

A Hindu lady who had inherited her father's estate gave a mortgage purporting to be for the discharge of a debt of hers but the mortgage deed did not recite that the debt was for a purpose binding on the estate. A decree was obtained against her on the mortgage and the property sold in execution; the sale proclamation containing an express recital that the absolute interest was being sold and not merely the limited interest of the daughter and that the mortgage was given for legal necessity.

Held, the sale proclamation could not by itself be treated as evidence that the daughter was sued and that the decree was obtained against her in a representative capacity and that the alienee could not succeed in the absence of evidence *aliunde,* that the original mortgage was supported by legal necessity. The decisions in 34 Mad. 188 and 20 C. L. J. 23 do not lay down that proof of necessity for the original debt can be dispensed with where the whole estate as opposed to the limited interest of a Hindu widow or daughter is sold in execution of a decree obtained against her.

Per *Ramesam, J.*—(*i*) The decision in 48 M. L. J. 224 correctly states the effect of the Privy Council decisions about ancient alienations. (*ii*) No hard and fast rule should be laid down as to what is or is not an ancient alienation.

Per *Venkatasubba Rao, J.*—(*i*) The debt being a personal debt of the widow or daughter does not prevent her being sued and a decree being obtained against her in a representative capacity (*ii*) The decisions in 44 Cal. 186 (P. C.) and 43 Mad. 541 (P. C.) do not refer only to cases where there are recitals as to necessity in mortgages or sales by Hindu females.

V. Govindarajachari for Appellant.

T. R. Ramachandra Aiyar and *Y. Suryanarayana* for Respondents.

T. S. V.

Odgers, J.
2nd February, 1926.

S. A. No. 1105, *etc., of* 1924.

Madras Estates Land Act, S. 192 (e)—Suit for rent and acceptance of patta—Set-off claimed as regards trishvekam—

Nature of—If can be allowed to be gone into—Order of remand passed in appeal for ascertaining balance—Nature of—If appealable.

In certain suits filed by a mittadar against a ryot for rent under S. 77 of the Madras Estates Land Act and for acceptance of patta under S. 56 of the said Act, the ryot pleaded that under a permanent patta subsisting between the parties, he was entitled to a deduction of the *trishvekam* payable by the mittadar to him, that the mittadar could only get a decree for the balance that may be due, and that a term should be inserted in the patta providing for such deduction.

Held, that the defendant's claim was not really one for set-off coming within the mischief of S. 192 (*e*) of the Madras Estates Land Act and that the deduction could properly be insisted on by virtue of the contract between the parties and that a clause should be inserted in the patta in regard to the said deduction. S. A. No. 185 of 1911 followed. 43 Mad. 69 distinguished.

Semble.—An order of the District Judge in appeal remanding the rent suits to the Court below for ascertaining the amount of *trishvekam* due and for passing a decree for the balance is an order of remand and not a preliminary decree of the nature referred to in O. 20, R. 16, Civil Procedure Code and no appeal lay against it whether it was an order made in the exercise of the Court's inherent jurisdiction or under O. 41, R. 23 of the Civil Procedure Code. 47 M. L. J. 552 ; 12 I. C. 146 ; 1 L. W. 667 ; 29 I. C. 265 referred to.

E. Vinayak Rao for Appellant.

K. Kameswara Rao for *V. Govindarajachari* for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
2nd February, 1926. — *L. P. A. No. 7 of* 1925.

Civil Procedure Code, S. 100—Negligence of guardian of minor—Finding of fact—Interference in second appeal—When warranted.

A finding of an Appellate Court that the guardian of a minor was not guilty of negligence in a particular case is one of fact and in the absence of anything to show that the finding was arrived at on a misconception as to the law, it cannot be interfered with in second appeal. Where in second appeal such a finding was reversed, it was restored on Letters Patent Appeal. 47 M. L. J. 928 reversed.

K. V. Krishnaswami Aiyar and *K. Rajah Aiyar* for Appellants.

C. S. Venkatachari and *N. C. Vijayaraghavachari* for Respondents.

T. S. V.

Krishnan, J.
2nd February, 1926. } *C. M. S. A. No.* 88 *of* 1924.

Civil Procedure Code, O. 38, R. 2—Surety bond—Production of debtor—Interim order of protection obtained—Subsequent liability of surety.

A person having been arrested before judgment, another stood surety for him under O. 38, R. 2 and executed a bond in the usual form. On a subsequent date he produced the debtor in Court, but he had in the interval obtained an interim order of protection. The surety was still sought to be made liable on the ground that the production of the debtor in Court was not appearance within the meaning of the rule for purposes of arrest, etc. *Held,* the surety was for appearance only and, after the production in Court, his liability ceased. (1923) Rang. 98 (2) cited.

K. V. Krishnaswami Aiyar for Appellant.

B. Sitarama Rao and *P. N. Appusami Aiyar* for Respondents.

T. S. V.

Wallace, J.
3rd February, 1926. } *C. R. P. No.* 913 *of* 1924.

Hindu Law—Mortgage executed by father—After-born son, if can question execution and consideration—Procedure—Mortgage not proved by attestors—Attestors not present in Court—Plaintiff, if entitled to a further opportunity to examine attestors—Appellate Court reversing the judgment of the trial Court on an erroneous view of the law and remanding the case for trial on an issue which did not arise—High Court—If will interfere with the order of remand in revision—Civil Procedure Code (V of 1908), *S.* 115.

Where in a suit by the plaintiff against the defendant on a mortgage executed by the defendant's father, the defendant put the plaintiff to the proof of execution and consideration and the first Court found that execution has not been proved and that the document was not supported by consideration and dismissed the suit, but on appeal the Lower Appellate Court held that the defendant having been born only subsequent to the date of the mortgage, he was not entitled to question the consideration

therefor and that the only proper question to consider was whether the document was intended to be given effect to and that on the question of execution also, the plaintiff might have been misled and so should be given an opportunity to prove execution by the attestors and reversed the judgment of the Trial Court and remanded the case for rehearing in revision.

Held, (*i*) that the order of the Lower Appellate Court remanding the suit for trial on the question whether the document was intended to be given effect to and giving a further opportunity to the plaintiff to let in evidence about execution was highly irregular and must be set aside ;

(*ii*) that the Lower Appellate Court's view that an after-born son cannot question the consideration for a mortgage executed by his father is wrong law and that the only thing he cannot question is the necessity therefor ; and

(*iii*) that in the absence of any allegation to the effect that the plaintiff had witnesses ready to prove execution whom the Trial Court did not allow him to examine, he was not entitled to a fresh opportunity to let in evidence on that question.

Watrap S. Subramania Aiyar (*Mr. T. R. Ramachandra Aiyar* with him) for Petitioners.

K. Rajah Aiyar for Respondent.

T. S. V.

Phillips and Krishnan, JJ.
3rd February, 1926.
C. M. P. No. 1057 *of* 1925.

Civil Procedure Code, Ss. 109, 110—*Scheme suit—Suit for removal of trustee and framing scheme—Death of trustee—Abatement—Order of remand for framing scheme—If appealable.*

Pending a scheme suit under S. 92, Civil Procedure Code, for removal of the defendant trustee and for framing a scheme, the defendant died and the Court held that the suit abated with his death. In appeal the High Court decided that so far as the relief of framing a scheme was concerned the cause of action survived and on that basis remanded the suit. The aggrieved defendants applied for leave to His Majesty in Council. *Held,* the order was not appealable. 47 Cal. 918; 47 All. 335 followed. 21 C. L. J. 279 ; 6 Pat. L. J. 116 doubted.

C. S. Venkatachari for *T. Rangachariar* for Petitioner.

S. Srinivasa Aiyangar and *K. S. Jayarama Aiyar* for Respondents.

T. S. V.

Devadoss and Waller, JJ.
3rd February, 1926.

L. P. A. No. 240 of 1925.

Letters Patent, Madras, cl. 15—Judgment—Order refusing stay of execution—If amounts to.

An order of a High Court Judge ordering stay of execution on terms amounts to a judgment within the meaning of cl. 15 of the Letters Patent. The decision of the Judicial Committee in 49 M. L. J. 25 has not overruled the decision in 35 Mad. 1 (F. B.) and other Madras cases as to what orders amount to judgments. 47 Bom. 724 (P.C.) referred to.

S. T. Srinivasagopalachari for Appellant.

T. M. Krishnaswami Aiyar for Respondent.

T. S. V.

Devadoss and Waller, JJ.
3rd February, 1926.

C. M. A. No. 24 of 1924.

Civil Procedure Code, O. 21, R. 89—Mortgage decree—Apportionment partly over tarwad property and partly over private property—Sale of properties—Deposit of money to set aside sale of tarwad property alone—If valid.

The *Karnavan* of a Malabar *tarwad* mortgaged *tarwad* property as well as his own private property. In a suit by the mortgagee a decree for sale was passed, fixing a portion of the debt on *tarwad* property and the other portion on the private property. A sale was held and thereafter an application was put in under O. 21, R. 89, Civil Procedure Code, to set aside the sale of *tarwad* property alone after depositing the amount necessary for that. The question arose whether the whole decree amount for which the properties were sold should be deposited or it was enough to deposit the amount fixed on the *tarwad* property. *Held,* the sale of the *tarwad* property could be set aside on depositing the amount fixed in the decree with respect to it. 48 M. L. J. 121 at 125 ; 39 Mad. 429 distd.

T. R. Ramachandra Aiyar and *A. Vasudeva Menon* for Appellants.

K. P. M. Menon and *P. Govinda Menon* for Respondents.

T. S. V.

Phillips and Madhavan Nair, JJ.
4th February, 1926.

C. M. S. A. No. 17 of 1925.

Civil Procedure Code, S. 47 and O. 21, R. 66—Mortgage decree—Execution—Application by purchaser of one of the items to have it sold last—Dismissal in first Court—Reversal in appeal—If proper—Relief if could be given in execution.

N R C

B mortgaged four items of properties to *A* in 1910 and subsequently sold item 1 to *C*, the consideration going towards discharging certain mortgages which existed prior to 1910. *A* brought a suit on his mortgage impleading *C* also as a defendant and obtained a decree subject to the rights of priority of *C*. When he applied for sale, *C* applied under O. 21, R. 66 that the items not sold to him might be sold first, but the Court dismissed the application holding there were no equities in his favour. *C* appealed and the Lower Appellate Court directed item 1 to be sold last. In an appeal by *A*, *held* (1) the order of the executing Court though passed under O. 21, R. 66 was also one coming under the purview of S. 47 and as such was appealable. 24 M. L. J. 477 ; 45 M. L. J. 478 followed. *Quaere*: If 27 Mad. 259 (F. B.) is good law after the coming into force of the Civil Procedure Code, 1908 ? and (2) the executing Court had power to grant the relief to *C* in execution, even if it might have been asked for in the suit and refused. 46 M. L. J. 32 followed.

K. Ramamurthi for Appellant.

G. Lakshmanna and *A. Satyanarayana* for Respondents.

T. S. V.

Devadoss and Waller, JJ.
5th February, 1926.

C. M. A. No. 272 *of* 1924.

Civil Procedure Code, O. 21, R. 2—Applicability—Decree under which money is payable—"The decree," "of any kind"—Significance of.

O. 21, R. 2 does not apply to all kinds of decrees, irrespective of their nature, but only to decrees under which money is payable whether they are accompanied by other reliefs or not. 23 Bom. L. R. 981 dissented from. The words "the decree" mean only decrees under which money is payable. The addition of the words "of any kind" in 1908 was only to set at rest the conflict of rulings in the different High Courts, and the Legislature did not intend to bring under the rule all decrees irrespective of their nature. History of the section in the various Codes of Civil Procedure traced. 43 Mad. 476 ; 6 Cal. 786 ; 22 Mad. 183 ; 15 M. L. T. 338 ; (1917) M. W. N. 327 ; 25 M. L. J. 586 referred to.

S. T. Srinivasagopalachari for Appellant.

L. A. Govindaraghava Aiyar for Respondent.

T. S. V.

Odgers, J.
5th February, 1926.

S. A. No. 330 *of* 1923.

Co-owners—Lessee under one in possession of a specific plot—Whether entitled to injunction against others.

A lessee of a definite site from one of four Mahomedan inamdars who are co-owners of a big undivided plot can claim to have an injunction against the other co-owners restraining them from interfering with his possession. He is not merely entitled to joint possession. In proper cases injunction can be issued in favour of one co-owner against another co-owner. 11 L. W. 606 ; 5 I. C. 171 distinguished. 19 C. W. N. 442 followed.

K. G. Srinivasa Aiyar for Appellant.

V. Sundaresa Aiyar for *T. V. Muthukrishna Aiyar* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
5th February, 1926.
L. P. A. No. 49 *of* 1925.

Hindu Law —Joint family—Alienation by one member—Suit to set side—Alienee if could enforce equity in that suit itself—Separate suit for partition if barred—Procedure to be followed.

In a suit to set aside an alienation made by one member of a joint Hindu family of an item of family property, it is not open to the alienee to contend that as the other family properties were more than sufficient to pay all debts, etc , the item sold to him should be allotted to his alienor and the equities in his favour worked out in that suit itself. His proper remedy is to sue for general partition. 45 Mad. 449 folld. ; 46 Mad. 815 explained. A subsequent suit by the alienee for general partition would not be barred by *res judicata.* 49 M. L. J. 679 dissented from ; 44 M. L. J. 309 referred to.

In such a case the proper procedure to follow is that adopted in 43 Bom. 17, *i.e.*, to stay execution of the decree for a fixed time and allow the alienee within that time to file a suit for general partition.

T. M. Krishnaswami Aiyar for Appellant.

C. Krishnamachari for Respondent.

T. S. V.

Devadoss, J.
5th February, 1926.
C. R. P. No. 331 *of* 1924.

Madras Revenue Recovery Act, S. 5*—Sale of land—Patta still remaining in the name of vendor—Payment of revenue by vendor—Suit to recover payments from vendee—If maintainable in Small Cause Court—Limitation Act, Art.* 61*—Applicability.*

The owner of a certain property sold it by registered sale deed to another, but the patta still remained in his own name. He went on paying the revenue and sued the vendee for four years' payments made by him. *Held*, (1) as the sale deed contained a special covenant for payment of revenue, a suit for money

was maintainable. 30 Mad. 35; 33 Mad. 41; C. R. P. No. 489 of 1923 distd. ; (2) an objection that such a suit was not maintainable in a Small Cause Court, as the vendor's remedy was merely to enforce a charge on the land, should be raised in the Trial Court itself, and if not so raised cannot be allowed to be taken in revision ; and (3) the suit was governed by Art. 61 and not Art. 116 of the Limitation Act.

T. S. Viswanatha Aiyar for Petitioner.

S. Venkatachela Sastri for Respondent.

T. S. V.

Phillips, Krishnan and Ramesam, JJ. *8th February*, 1926. — *C. R. P. No.* 771 *of* 1923.

Madras Estates Land Act, S. 8, *Exception and Ss.* 3 (2) (*d*) *and* 6 (2)—*Inam—Surrender by ryot—If an acquisition within the meaning of Exception—"Otherwise"—Rule of* ejusdem generis —*Construction.*

In the case of an *inam* falling within S. 3 (2) (*d*) of the Estates Land Act, a surrender of the land by the ryot in possession amounts to acquisition within the meaning of the Exception to S. 8 so as to take the lands surrendered out of the category of an "estate". The word "acquisition" is not used in the Exception in a limited sense so as to exclude cases of surrender ; and the word "otherwise" in S. 8 (1) should not be read *ejusdem generis* with what precedes it.

The language of S. 6 (2) is not to be referred to for construing S. 8, and does not govern it.

Cases under the Estates Land Act and Bengal Tenancy Act referred to.

A. Krishnaswami Aiyar and *Ch. Raghava Rao* for Petitioners.

S. Varadachari and *V. Govindarajachari* for Respondents.

T. S. V.

Spencer, J. *8th February*, 1926. — *S. A. No.* 951 *of* 1923.

Madras Survey and Boundaries Act (*IV of* 1897), *S.* 13—*Decision that land is pre-settlement minor inam—If involves boundary dispute—Need not be set aside.*

The decision of a survey officer that a particular strip of land is a pre-settlement minor inam and not the ryoti land of the Zamindar where the said land was admittedly within the ambit of the estate, does not involve a boundary dispute and has not, therefore, got to be set aside under S. 13 of the Madras Survey and Boundaries Act, 1897.

R. Ganapathy for *S. Srinivasa Aiyangar* for Appellant.

V. Govindarajachari for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
8*th February,* 1926.

C. R. P. No. 512 *of* 1923.

Arbitration —Award—Decree passed before the expiry of ten days for filing objections—Limitation Act, Art. 158—*Appeal if lies.*

Where on an award being filed, the Court passed a decree in terms of the award before the expiry of the ten days prescribed by Art. 158, Limitation Act, after overruling objections to the award, the decree is not appealable.

Quaere : Whether an appeal would lie against a decree passed in terms of an award within the period of ten days of such filing, where no application for setting aside the award has been filed ?

K. Kameswara Rao for Petitioner.

K. Krishnaswami Aiyangar for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
9*th February,* 1926.

C. M. S. A. No. 85 *of* 1924.

Hindu Law—Joint family—Decree against father—Partition—Right of creditor to proceed against share of son.

A creditor who has obtained a decree against the father of a joint Hindu family cannot proceed in execution against the shares of the sons obtained by them at a partition effected subsequent to the decree. 47 Mad. 621 folld.

K. Bhashyam Aiyangar and *S. Krishnaswami Aiyangar* for Appellant.

D. Ramaswami Aiyangar for *C. S. Venkatachariar* for Respondent.

T. S. V.

Odgers, J.
9*th February,* 1926.

S. A. No. 924 *of* 1923.

Malabar Law—Will—Construction—Death of legatee before testator —If property goes to residuary legatees.

C, who was divided from the other members of his *tarwad,* executed a will by which he gave one item of property to his mother and other specific items to his wife and children. The mother predeceased him. There was a clause in the will that nobody was to inherit his properties in derogation of his will. The wife and children of C claimed the item bequeathed to the mother as residuary legatees, while the *tarwad* of C claimed the same as on intestacy. *Held,* the wife and children were not

residuary legatees and the item bequeathed to the mother did not lapse to them. 6 Ch. App. 333 folld.

K. P. Ramakrishna Aiyar for Appellant.

K. P. Krishna Menon for Respondent.

T. S. V.

Phillips, J.
12th February, 1926. } *C. R. P. No.* 230 *of* 1924.

Civil Procedure Code, S. 11, *Explanation IV—Suit for arrears of rent—Decree passed—Subsequent suit for rent—Question of rate of rent—If open.*

A suit between landlord and tenant for arrears of rent due under a lease deed was first decreed *ex parte* and again after the *ex parte* decree was set aside, the issue raised being "What is the amount due to the plaintiff ?" In a subsequent suit for rent for a later period, the defendant raised the question of the rate of rent and contended that the rate had not been adjudicated upon in the previous suit. *Held,* the question cannot be gone into, as it is barred by S. 11, Explanation IV, Civil Procedure Code. 16 Cal. 300 (F. B.) distinguished.

K. Aravamudu Aiyangar for Petitioner.

K. G. Srinivasa Aiyar for Respondent.

T. S. V.

The Chief Justice, Phillips, Krishnan, Beasley and Madhavan Nair, JJ.
15th February, 1926. } *Cr. Rev. Case No.* 490 *of* 1922.

Indian Penal Code, S. 499—*Complaint—Defamatory statement in—Privilege if absolute—Rules of English Common Law—Applicability—Position of counsel and witnesses.*

A complaint filed by a person before a Magistrate described *X* as the paramour of *Y*. *X* thereupon charged the complainant of defamation, and the latter pleaded absolute privilege as being in connection with proceedings in a Court of Law. *Held,* by the Full Bench, there was no absolute privilege for the complainant. The Indian Penal Code is a self-contained enactment and the principles of the English Common Law as to the absolute privilege cannot be imported into S. 499, I. P. C., except in so far as it is contained in the various exceptions to the section. 36 Mad. 216; 37 Mad. 110 overruled. 48 Cal. 388 ; 3 Rang. 524 referred to.

Their Lordships did not feel called upon to express any opinion as to the nature of the privilege enjoyed by counsel and

witnesses with reference to proceedings in a Court of Law.

The Public Prosecutor (*J. C. Adam*) for the Crown.

A. S. Sivakaminathan amicus curiae.

T. S. V.

Wallace, J.

16th February, 1926.

C. M. S. A. No. 81 *of* 1924.

Civil Procedure Code, Ss. 144 *and* 37 (*b*)—"*Court of first instance*"—*What is—Territorial jurisdiction altered subsequent to passing of decree—Application for restitution if one for execution* —Cursus curiae—*Matters of procedure.*

Where since the passing of a decree, the territorial jurisdiction of the Court over the subject-matter of the suit has been taken away, for the purposes of applying for restitution under S. 144, C P.Code, the expression "Court of first instance" must be construed on the general principle contained in S. 37 (*b*) and the application should be made to the Court which, if the suit wherein the decree was passed was instituted at the time of making the application, would have jurisdiction to try such suit. Such a case would not be governed by S.150 of the Code. 13 L. W. 67 refd. to.

The trend of decisions in Madras is to treat an application for restitution as one in execution, and it would include collateral reliefs, such as interest, damages and compensation. Though the decisions in other High Courts are to the contrary, uniformity of procedure is what is to be aimed at. Case-law referred to.

M. S. Venkatrama Aiyar for Appellant.

S. Muthiah Mudaliar for Respondent.

T. S. V.

Wallace, J.

18th February, 1926.

C. R. P. No. 677 *of* 1925.

Civil Procedure Code, S. 149, *O.* 7, *R.* 11 *and O.* 47, *R.* 1—*Deficiency in Court-fee—Time given—Failure to pay—Payment at a later date—Application under S.* 151 *to excuse delay—Implicit extension of time—Powers of Court.*

The Court-fee on a plaint being deficient the plaintiff was given time to make up the deficiency. He did not comply with the order in time, but some time later paid the deficiency and put in an application under S. 151, C. P. Code, for the delay to be excused. The Court without notice to the defendant excused the delay. *Held*, though there was no application for extension of time under S. 149, the excusing of the delay and the acceptance of the deficit amount amounts to an implicit

extension which the Court has power to do. S. 149 gives the Court wide discretion either to give an extension of time or to disallow it. The powers of a Court under the section are not restricted by O. 7, R. 11. The omission to give notice before excusing the delay did not amount to an illegality. 38 Bom. 41 ; 39 I.C. 766 ; 34 I.C. 625 ; 24 C. L. J. 88 refd. to. 27 Cal 376 ; 34 Cal. 20 distd. 13 C. L. J. 78 doubted.

O. 47, R. 2 of the Civil Procedure Code is no bar to a District Munsiff reviewing the order of his predecessor in office excusing the delay in the payment of deficient Court-fee by a plaintiff.

Procedure to be followed in cases of deficiency in Court-fee explained.

V. Govindarajachari and *B. T. M. Raghavacharlu* for Petitioner.

K. Kameswara Rao for Respondent.

T. S. V.

Devadoss and Waller, JJ.
19th February, 1926. } *C. M. A. No.* 206 *of* 1925.

Civil Procedure Code, O. 30, *R.* 9—*Scope of—Execution petition—No leave obtained—Maintainability—Order dismissing objection—If a decree under S.* 2 (2)—*Not appealable.*

Objection was taken for the judgment-debtors in a certain execution petition that execution could not issue as no leave was obtained under O. 30, R. 9 of the C. P. Code. The objection was set out in the form of an execution application and the judgment-debtors asked in it that the execution petition should be dismissed. The Lower Court held that no leave was necessary, dismissed the application filed by the judgment-debtors and proceeded with the execution petition. On an appeal being filed against the order dismissing the judgment-debtors' application :

Held, that no appeal lay as the order was merely an interlocutory order on an incidental question of law and did not therefore come under S. 2 (2), C. P. Code. 18 Cal. 469 followed.

Held further, that in suits by a firm against some of its partners or between firms having some partners in common, leave of the Court must be obtained for the execution of the decree even in cases where the suit is for moneys borrowed by the defendant or defendants just like any other debtor.

P. Markandeyulu for Appellants.

G. Lakshmanna and *V. Govindarajachari* for Respondent.

T. S. V.

Odgers, J.
16*th February*, 1926.

S. A. No. 1046 *of* 1923.

Minor—Guardian ad litem—Defence put in—Trial exparte *—Petition to set aside* ex parte *decree—Dismissal of—Suit to set aside decree—If lies.*

In a suit against a minor, the guardian *ad litem* filed a written statement containing a valid defence, but did not thereafter attend the trial of the case. The suit was decreed *ex parte* and a petition by the guardian to set aside the *ex parte* decree was dismissed. A suit was then filed by the minor through a fresh guardian to get the decree vacated. *Held*, the *ex parte* decree was null and void and would not bind the minor as the guardian was guilty of gross negligence in not going to trial. 45 Mad. 525; 46 M. L. J. 12 followed; L. P. A. No. 2 of 1925 referred to.

C. V. Ananthakrishna Aiyar and *T. K. Srinivasatatachari* for Appellant.

B. Somayya for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
19*th February*, 1926.

C. R. P. No. 12 *of* 1924.

*Civil Procedure Code, S.*89 *and Sch. II, R.*1—*Applicability—Reference to arbitration out of Court—One of the parties minor—Effect of.*

Where an award is passed on a reference to arbitration made out of Court and it subsequently transpires that one of the parties to the reference was a minor, the award is invalid. 47 Cal. 555; 42 Mad. 632; 34 M. L. J. 71 referred to.

Quaere: Where the award would bind at least the adult members who were parties to the reference? 83 E.R. 554; 115 E. R. 114; 13 L. J. Ch. 350 referred to.

S. Rajagopalachari for Petitioner.

N. S. Rangaswami Aiyangar for Respondent.

T. S. V.

The Chief Justice and Ramesam, J.
19*th February*, 1926.

A. S. No. 225 *of* 1921.

Hindu Law—Adoption—Ante-adoption agreement — Test of reasonableness—What is.

In the case of ante-adoption agreements the true test of reasonableness is whether the agreement could be said to be a

good bargain for the adoptee having regard to his position in the natural family.

An ante-adoption agreement entered into by the natural father on behalf of an adopted boy not to question an alienation previously made by the adoptive mother in favour of her daughter is valid.

K. S. Krishnaswami Aiyangar and *K. Ramamurthi* for Appellant.

A. Krishnaswami Aiyar and *V. Govindarajachari* for Respondents.

T. S. V.

Phillips and Madhavan Nair, JJ.
19th February, 1926. — *L. P. A. No. 26 of 1925.*

Evidence Act, S.65—Secondary evidence of document—When admissible—Court admitting satisfied that a case made out for letting in such evidence—Discretion—Interference in second appeal.

Where a Court of Appeal is satisfied that the necessary quantum of proof has been let in to admit secondary evidence of a document, the High Court in Second Appeal should not interfere and reject the document as inadmissible because in its opinion a case had not been made out for letting in secondary evidence. The matter is one in the discretion of the Court below and even if it finds merely on hearsay evidence, that the document sought to be proved had been lost and on that basis allows secondary evidence, the same should not be upset in second appeal, for if the objection had been taken in the Court below other satisfactory evidence might have been forthcoming. 120 E. R. 827 ; 115 E. R. 631 refd. to ; 19 Cal. 438 ; 101 E. R. 503 ; 108 E. R. 854 distinguished. Decision in 47 M. L. J. 906 reversed.

S. Varadachari and *P. V. Vallabacharyulu* for Appellants.

C. Rama Rao for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
22nd February, 1926. — *C. M. S. A. No. 84 of 1924.*

Civil Procedure Code, S. 47 and O. 21, R. 90—Auction sale—Application to set aside—Income of property not mentioned in the sale proclamation—Low price—Second appeal if lies.

Where an application is put in under O. 21, R. 90 to set aside an execution sale on the ground that the income of the property sold was not mentioned in the sale proclamation and also that the price was very low, it does not fall under S. 47

also and the order passed is not one from which a second appeal lies.

M. Patanjali Sastry for Appellant.

K. Krishnamachari and *K. Chakravarti* for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ. *24th February, 1926.*	*L. P. A. No.* 42 *of* 1925.

Registration Act, Ss. 17 and 49—Partnership—Release by a partner of his rights—If requires registration—Document—Admissibility.

A partner in a running concern wanted to retire from the partnership and on receiving a certain sum of money fixed by mediators, he executed a deed whereby he released all his rights in the partnership, which possessed considerable immoveable property. *Held*, there was no extinguishment of rights in immoveable property or surrender of any interest therein and the document did not require registration. 25 Mad. 149; 45 Mad. 378; 17 Bom. 235; 43 Ch. D. 208; (1900) 2 Ch. 410 referred to.

Such a release deed does not "affect any immoveable property" within the meaning of S. 49, Registration Act, as all the property still remained partnership property, and its only legal effect being that there was one partner the less, the document was admissible in evidence.

A. Krishnaswami Aiyar for Appellant.

V. Ramadoss and *V. Krishna Mohan* for Respondent.

T. S. V.

The Chief Justice, Spencer and Krishnan, JJ. *24th February,* 1926.	*Cr. Appeal No.* 551 *of* 1925.

Criminal Procedure Code, S. 190, (1) (b)—Any offence—Meaning of—Non-cognisable offence—Police report—If magistrate can take cognisance on.

The words "any offence" in S. 190, Cr. P. Code are very wide, and include both cognisable and non-cognisable offences. A magistrate has therefore power to take cognisance of even a non-cognisable offence on the report of a Police officer. (1925) M. W. N. 317 overruled; 26 Bom. 150 commented on; 6 M. L. T. 259; 11 A. L. J. 331; 46 Cal. 807 referred to.

The Public Prosecutor (J. C. Adam) for the Crown.

C. S. Venkatachari and *D. Ramaswami Aiyangar* for the Accused.

T. S. V.

Devadoss and Waller, JJ.
25th February, 1926. — *Cr. Appeal. No.* 462 *of* 1925.

Penal Code, S. 405—*Criminal breach of trust—Taluq Board —President restrained by injunction from acting—Vice president carrying on functions—Offence under S.* 405—*Sanction under S.* 197, *Cr. P. Code if necessary—Madras Local Boards Act Ss.* 18 (1), 23 (2) *and* 43.

Pending an election inquiry, the President of a Taluk Board was restrained by an injunction order of a Civil Court from entering on his duties and the Vice President under S. 23 (2) of the Madras Local Boards Act carried on his functions and in respect of acts done during that period, he was prosecuted for an offence under S. 405, I. P. C. *Held,* as he was not in law the President of the Taluq Board, he was not a public servant removable by the Local Government and as such no sanction was necessary under S. 197, Cr. P. Code for launching the prosecution 42 Mad. 609 distd ; 2 Weir 226 referred to.

Meaning of the word "wilful" in S.405, I. P. C. explained.

As their Lordships differed on the facts as to whether the appellant was guilty under S. 405, I. P. C. the case was directed to be posted before a third judge under S. 429, Cr. P. Code.

K. S. Jayarama Aiyar and *A. Venkatasubba Rao* for Appellant.

The Public Prosecutor (*J. C. Adam*) for the Crown.

T. S. V.

Devadoss and Waller, JJ.
25th February, 1926. — *Cr. Rev. Case No.* 707 *of* 1925.

Madras District Municipalities Act, S. 347—*Notice by municipality directing a person to do an act—Failure to comply with order—No steps taken to enforce notice—Second notice issued—Validity of prosecution—Limitation.*

Where under the provisions of the Madras District Municipalities Act, a Municipality issues notice to a rate-payer to do a certain act, but takes no steps within the period of three months fixed by S. 347 to enforce the same, it is competent for the Municipality to issue another notice in respect of the same matter and on disobedience of the same launch a prosecution within 3 months of the second commission of the offence. There is nothing in the Act prohibiting the issue of a second notice, and failure to obey it would give a fresh cause of action 49 M. L. J. 386 dissented from; Cr. Rev. Case No. 164 of 1925 followed.

V. L. Ethiraj and *A. Rangaswami Ayyangar* for Petitioner.

The Public Prosecutor (*J. C. Adam*) for the Crown.

T. S. V.

The Chief Justice.
12th February, 1926.
S. A. No. 1080 of 1923.

Hindu Law—Reversioner—Estoppel—Dividing estate with widow—Transaction invalid as surrender—If can claim property after her death.

A presumptive reversioner entered into an arrangement with the widow during her lifetime whereby in consideration of obtaining a portion of the estate himself he agreed that in respect of the rest she might enjoy the same in absolute title. Subsequent to her death he sought to recover certain properties alienated by her in her lifetime. *Held,* the reversioner was estopped by his conduct from impeaching the transaction under which he got immediate benefit during her lifetime and the mere fact of the transaction between the widow and the reversioner being invalid as a surrender did not prevent estoppel operating.

G. Lakshmanna and *K. Ramamurthi* for Appellants.

Ch. Raghava Rao for Respondents.

T. S. V.

Phillips and Madhavan Nair, JJ.
24th February, 1926.
C. R. P. No. 655 of 1924.

Civil Procedure Code, O. 33, *R.* 15*—Schedule of property not given—Dismissal of application to* sue in forma pauperis*—Effect of—If bars fresh application.*

Where an application to *sue in forma pauperis* is dismissed because the applicant omitted to append a schedule of his property, such dismissal does not amount to a refusal of permission to sue as a pauper and it is competent to him to apply again for permission. 85 I. C. 982 refd. to ; 33 I. C. 812 distd.

B. C. Seshachela Aiyar for *B. C. Sankaranarayana* for Petitioner.

M. Ranganadha Aiyar for *N. Chandrasekhara Aiyar* for Respondent.

T. S. V.

Spencer, J.
25th February, 1926.
S. A. No. 876 of 1923.

Partnership—Rights of partners—Dealing with assets exclusively—Receiver—Sale by—Title conveyed—Remedy of purchaser.

No partner has a right during the continuance of partnership to take any partnership asset and deal with it exclusively as his property by way of a lease, mortgage, or otherwise. 52 I. C. 456 folld.

N R C

A sale by the Receiver in a suit for the winding up of a partnership to which one of the partners was not a party would still convey a good title to the purchaser and the remedy of such a party would not be by way of suit for recovery of his share of the property whatever his remedy against his co-partners may be by way of a suit for the re-opening of dissolution itself.

S. Varadachari and *Ch. Raghava Rao* for Appellant.

B. Somayya for Respondent.

T. S. V.

Devadoss and Waller, JJ. *25th February,* 1926. — *C. M. A. No.* 43 *of* 1924.

Interest—Landlord and tenant—Compromise decree—No provision for interest after date of decree—Executing Court—If can award interest—Interest Act—Applicability.

Where a compromise decree passed between landlord and tenant does not provide for payment of interest subsequent to decree, a Court executing the decree or enforcing it has no power to award interest as the decree is silent regarding it. 25 Mad. 265 ; 31 Bom. 15 ; (1914) M. W. N. 92 refd. to. As an executing Court, it has no jurisdiction to add anything to the decree. 5 I. A. 78 ; 46 Cal. 571 folld. Nor has it power to award interest by way of damages under the Interest Act, where there is no sum certain due under the decree. 40 M. L. J. 18 folld.

A. Krishnaswami Aiyar for Appellant.

K. V. Krishnaswami Aiyar and *V. Rajagopala Aiyar* for Respondent.

T. S. V.

Devadoss and Waller, JJ. *25th February,* 1926. — *C. M. A. No.* 271 *of* 1925.

Civil Procedure Code, O. 21, R. 89—Applicability—Mortgagee from judgment-debtor after attachment but prior to sale—If can apply to set aside sale.

Where after the passing of a decree and attaching of immoveable property in execution of the decree but prior to the sale thereof, the judgment-debtor mortgages the property, such mortgagee is entitled to apply to set aside the sale under O. 21, R. 89, C. P. Code. Such mortgagee cannot be in a worse position than the judgment-debtor ; nor is the transfer void for all purposes, since S. 64 only makes it void as against the decree-holder. 17 L. W. 60 dissented from ; 26 C. L. J. 187 folld. ; 41 Mad. 265, 554 ; 26 Mad. 365 refd. to.

G. Lakshmanna for Appellant.

G. Krishnaswami Aiyar, A. Krishnaswami Aiyar and *K. Kameswara Rao* for Respondents.

T. S. V.

Phillips and Madhavan Nair, JJ.
26th February, 1926. — *C. M. A. No. 476 of 1923.*

Civil Procedure Code, O. 21, R. 84—Shall forthwith be resold—Meaning of—Property put up for sale—Absence of bids—Effect of.

At an execution sale, the highest bidder failed to deposit the 25 per cent. of the purchase money, and soon after the property was again put up for sale. There were no bidders at the second sale and the original purchaser was sought to be made liable for the whole amount of his bid as deficiency of price under O. 21, R. 71, C. P. Code. *Held,* that putting up the property for sale a second time was a sufficient compliance with O. 21, R. 84 and must be deemed to have amounted to a resale, though there was no actual sale owing to absence of bidders.

S. Panchapakesa Sastri for *S. Duraiswami Aiyar* for Appellant.

K. S. Krishnaswami Aiyangar and *T. N. C. Srinivasa Varadachariar* for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
26th February, 1926. — *C. M. S. A. No. 80 of 1924.*

Limitation Act, Art. 180—Application for delivery of possession—Limitation for—Suit to set aside sale—Pendency of—Period if can be excluded—Order on—If appealable—C. P. Code, S. 47.

An order passed in proceedings arising out of an application for delivery of possession by the representative of the decree-holder purchaser against a representative of the judgment-debtor is appealable, as the matter is one relating to execution and falls under S. 47, C. P. Code. 28 Mad. 89 folld.; 43 Mad. 107, 185; 41 M. L. J. 120 distd.

The period of time for applying for such delivery of possession is three years from the date when the sale became absolute and there is no provision of law for excluding in favour of such auction purchaser the period of the pendency of a suit filed by the judgment-debtor to set aside the sale.

V. Narayanan for Appellant.

S. Varadachariar and *P. N. Marthandam Pillai* for Respondent.

T. S. V.

Wallace, J.
1st March, 1926.
C. M. S. A. No. 76 *of* 1924.

Execution—Sale—Order in which properties to be sold—Claim rejected in suit—If can be set up again in execution—Decree-holder's rights of sale.

In a suit on a mortgage a certain puisne encumbrancer set up a plea that the items of properties mortgaged to him should be sold last, but the Court refused to give such a direction in the decree. He was also found by the Court to have taken the mortgage with notice of the plaintiff's mortgage. In execution, he again claimed the right of marshalling. *Held*, (1) the question of notice having been gone into in the suit, cannot be agitated again in execution. 45 M.L.J. 32; C.M.S.A. No. 17 of 1925 distd.; C.M.A. No. 6 of 1926 refd. to; (2) the decree-holder had an unfettered discretion to proceed against the properties in any way he liked and the fact that he brought the properties to sale in an order different from the one directed by the decree was not proof of fraud and the sale could not be set aside on that ground.

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar* for Appellant.

P. N. Appasami and *P. V. Krishnaswami* for Respondents.

T. S. V.

Odgers, J.
1st March, 1926.
S. A. No. 1055 *of* 1923.

Transfer of Property Act, Ss. 58 *and* 100*—Agreement to give mortgage right—Effect of—If creates charge or lien.*

In a suit in ejectment the defendant claimed that she had redeemed a mortgage on the property at the request of the plaintiff and therefore that she had a charge or lien on the property. *Held*, a bare agreement to give a mortgage right would not confer on the defendant any right by way of subrogation, charge or equitable lien. 36 Mad. 426 folld.; (1899) 1 Ch. 353; (1910) 2 Ch. 277 and 89 I. C. 116 distd.

A. Venkatrayaliah and *L. Venkatanarasiah* for Appellants.

D. Ramaswami Iyengar for *C. S. Venkatachari* for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ. 2nd *March,* 1926. — *C. R. P. No.* 400 *of* 1925.

The Guardian and Wards Act, S. 41 (3) *and* (4)—*Ward attaining majority—Guardian filing accounts—Power of court to enquire into correctness of—Remedy.*

Where on a ward of court attaining majority, the guardian filed into Court accounts relating to the estate, the court has no jurisdiction to direct an enquiry being held into the correctness of the same. Under the scheme of the Act, the remedy of the person aggrieved is by suit. 5 C. W. N. 207 ; 21 C. W. N. 688 ; 29 C. L. J. 44 folld. ; 46 All. 458 dissented from.

B. Samayya for Petitioner.

M. Patanjali Sastri for Respondent.

T. S. V.

Odgers, J. 2nd *March,* 1926. — *S. A. No.* 1090 *of* 1923.

Civil Procedure Code, O. 6, *R.* 17—*Amendment—Effect of—Plea of limitation—Depriviation of—Initials—If sufficient signature—Limitation Act,* S. 19.

An amendment of a plaint should not be allowed if it would result in depriving the defendant of a valid plea of limitation.

Quaere : whether initials would constitute sufficient signature for purposes of an acknowledgment of liability under S. 19, Lim. Act ? 15 Mad. 261 refd. to.

K. N. Rajagopala Sastry for *B. Satyanarayana* for Appellant.

Ch. Raghava Rao for Respondent.

T. S. V.

Devadoss and Waller, JJ. 3rd *March,* 1926. — *L. P. A. No.* 111 *of* 1925.

Contract Act, S. 23—*Compromise decree—Adoption agreement—Inducement offered—If opposed to public policy—Penal Clause—Family arrangement.*

In a suit for possession, a compromise decree was passed to the effect that the defendant was to adopt plaintiff's son within 2 months, in which case the defendant and the adopted son were to retain possession of certain properties as joint family property. In default of making the adoption the defendant was to convey to the plaintiff half of the properties in his possession. The adoption did not take place and the plaintiff enforced the compromise decree and obtained possession of half of the properties. Thereafter the defendant who had been

deprived of the properties sued to set aside the compromise decree on the ground that the adoption agreement was opposed to public policy as it offered an inducement. *Held*, the compromise was a *bona fide* family arrangement, and it was not opposed to public policy as there was no conflict of interest with duty. 12 Cl. and F. 45; 36 Bom. 180 folld; 29 Mad. 161; 32 Mad. 185 distd. 13 Ben. L. R. App. 42; 37 Mad. 393 referred to. Nor did the default clause amount to a penalty.

T. M. Krishnaswami Aiyar and *K. Venkatrama Raju* for Appellant.

S. Varadachari, P. Somasundaram and *V. Suryanarayana* for Respondents.

T. S. V.

Srinivasa Iyengar, J.

3rd March, 1926.

C. S. *No.* 180 *of* 1923.

Transfer of Property Act, S. 52—Auction purchasers—If take the benefit of the section—Sub-Mortgage—Extinction of, by sale.

Between the dates of the preliminary and final decrees in a mortgage suit to which a sub-mortgagee was a party be sub-mortgaged his right. *Held* the doctrine of *lis pendens* applied and the purchaser at the sale in pursuance of the final decree got the property free of such further sub-mortgage. Auction purchasers at court sales can take the benefit of S. 52, Transfer of Property Act. 31 M.L.J. 839; 43 Mad. 696 relied on. *Held*, also that where the original sub-mortgage was paid up out of the sale proceeds, the subsequent sub-mortgage made without notice to any of the parties to the suit or to the court was also extinguished (1917) M. W. N. 111; 30 M. L. T. (H. C.) 21 followed.

C. S. Venkatachari, S. Gurusami Chetty and *R. Krishniah Chetty* for Plaintiff.

V. Radhakrishnayya and *K. Duraiswami Aiyangar* for Defendant.

T. S. V.

Odgers, J.

3rd March, 1926.

S. A. *No.* 1137 *of* 1923.

Civil Procedure Code, S. 102—Suit for maintenance—Disputes between Mahamedan husband and wife—Settlement—Subsequent divorce—Effect of—Suit for maintenance—Nature of.

A Mahomedan husband and wife having quarrelled, the wife applied for maintenance under S. 488, Criminal Procedure

Code. Thereupon a relation of the husband executed a maintenance deed in settlement of all disputes and thereby undertook to maintain her at a certain rate during her life time. She was subsequently divorced by her husband and then she sued his relation for arrears under the maintenance deed. *Held* the suit fell under Art. 38 of Schedule II of the Provincial Small Cause Courts Act and even where the amount is less than Rs. 500, there was a right of second appeal, 40 All. 52 folld.; 6 M. L. J. 137; 38 Mad. 553; 27 I. C. 824; (1890) A. W. N. 201 distinguished. *Held* also the subsequent divorce did not disentitle her to maintenance under the deed and the principle of the decision in (1903) 2 K. B. 740 did not apply.

Ch. Raghava Rao for Appellant.

K. Ramamurthy and *K. Kameswara Rao* for Respondent.

T. S. V.

Wallace, J.
3rd March, 1926. } *C. R. P. No.* 1164 *of* 1925.

Civil Procedure Code, O. 6, R. 17—Amendment of pleadings—Amendment necessitated by defendant's plea—If to be allowed.

An amendment of the plaint was asked for in the form of an alternative prayer which was necessitated by the defendant's own pleading. *Held* the raising of such an alternative prayer would cause no surprise to the defendants and should be allowed.

C. S. Venkatachari, P. N. Marthandam Pillai and *A. Ramamurthi* for Petitioner.

S. T. Srinivasagopalachari and *R. Gopalasami Iyengar* for Respondent.

T. S. V.

The Chief Justice and Ramesam, JJ.
4th March, 1926. } *A. S. No.* 114 *of* 1923.

Damages—Suit for—Agreement to lend money—On mortgage—Default—Mortgagee compelled to borrow elsewhere—Difference in rate of interest—Suit if maintainable.

B agreed to lend money to A on a mortgage of his properties for the express purpose of redeeming certain prior mortgages which were carrying a higher rate of interest. The document was executed and registered and recited the purpose, the mortgagee reserving the consideration for payment of the prior mortgages. B failed to pay the debts, and A had to raise a loan elsewhere for paying off the prior mortgages. He then sued B for damages, the amount claimed being the difference between the higher interest which the old mortgages

carried and the interest payable under the agreement. *Held* such an action lay and substantial damages could, be awarded, though a suit for specific performance may not lie. 49 L. T. 674 followed.

S. Varadachari and *T. M. Ramaswami Aiyar* for Appellant.

C. V. Anantakrishna Aiyar for Respondent.

T. S. V.

Devadoss and Waller, JJ.
5th March, 1926.

C. M. S. A. No. 63 of 1924.

Civil Procedure Code, S. 151, O. 9, R. 9, O. 47, Rr, 1 and 4 —Execution application—Dismissal of—No sale papers filed—Restoration of—No notice taken given to judgment debtor—Order illegal—Remedy of party.

An execution application was dismissed for failure to file the sale papers on the day fixed, but was restored on application made by the decree holder, but without notice to the judgment debtor. *Held,* (1) O. 9, R. 9 did not apply to execution proceedings, 23 L.W. 227 followed; (2) O. 47, R. 4 is imperative, and if the order of restoration is treated as one passed on review, it is illegal as it was passed without notice to the opposite party 43 Cal. 178 dissented from ; 51 Cal. 943 explained; (3) it was open to the judgment debtor to question the propriety of the order of restoration as soon as he became aware of it, without appealing therefrom 63 I. C. 99 ; 41 Mad. 412 folld ; and (4) it was open to the decree holder to apply again to execute the decree, but if such remedy is barred by time, that is no ground for invoking the inherent power of the court to restore the application. S. 151, Civil Procedure Code, cannot be invoked for the purpose of restoring an execution application dismissed for default. 2 Lah. 66 dissented from ; 4 P. L. J. 330 folld.

C. S. Venkatachari for Appellant.

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
9th March, 1926.

Crl. Rev. Case No. 772 of 1925.

Criminal Procedure Code, S. 247—Case called up at 11 a. m. —Complainant absent—Order of acquittal—If proper—' Upon the day appointed for the hearing of the accused "—Meaning of.

On the day fixed for the hearing of a case, it was taken up at 11 A. M., but as the complainant was absent at that time, the

Magistrate acquitted the accused. The complainant however turned up at 11-30 A. M. *Held* the expression " Upon the day appointed for the appearance of the accused " does not mew at any time before the close of the working day, and if the complainant is absent when the case is called up, the court is not bound to wait till the end of the day, but can straight away acquit the accused under S. 247. The opinion of *Jackson, J.* in Crl. Rev. Case 229 of 1925 dissented from ; 7 Mad. 213 ; 356 folld.

K. Bashyam Aiyangar for petitioner.

The Public Prosecutor for the Crown.

T. S. V.

Krishnan, Ramesam and Beasley, JJ.
9th March, 1926.

Ref. Case No. 17 *of* 1925.

Madras Stamp Act (VI of 1922), *Sch. I, Art.* 46—*Security bond—Village Court— Attachment of property — Security for production—Court Fees Act—Applicability.*

The Court Fees Act does not apply to proceedings under the Madras Village Courts Act, and a security bond executed before a village court for production of attached property must be stamped under Art. 46 of the Stamp Act. 46 Mad. 734 folld.

The Government Pleader for the Petitioner.

K. S. Desikan amicus curiae for Respondent.

T. S. V.

Odgers and Wallace, JJ.
9th March, 1926.

C. M. P. No. 140 *of* 1925.

Court Fees Act, Sch. I, Arts. 4 *and* 5—*Review—Court fee payable on—Amended Act coming into force at the time of presentation of application—Effect.*

Where at the time of the presentation of a review application the amended Court Fees Act had come into force, the court fee payable for review is to be calculated under the new Act and is not the amount paid on the plaint or memorandum of appeal. If only a portion of the decree is sought to be reviewed, court fee need be paid only on that, and not on the whole decree. 7 M. H. C. App. 1 ; 4 Bom. 26 folld. ; the view of the Calcutta and Allahabad High Courts that court fee on the whole decree should be paid, not followed.

C. Sambasiva Rao for Petitioner.

The Government Pleader for the Crown.

T. S. V.

Phillips and Madhavan Nair, JJ. } C. M. A. No. 382 of 1925.
10th March, 1926.

Civil Procedure Code, Ss. 145 and 151—Surety for production of property attached—Failure to produce—Enforcement of remedy—Execution proceedings—Power of court.

Where a person stands surety for the production of certain property attached in execution, but fails to produce the same the court can enforce it under its inherent powers in execution without necessitating the creditor's filing a suit after getting the bond assigned to him. 42 All. 158 (P. C.) and the view of Spencer, J. in 9 L. W. 476 folld. ; 39 M.L.J. 472; 62 I. C. 715 ; and the view of Sadasivier, J. in 9 L. W. 476 dissented from.

T. M. Krishnaswami Aiyar and *T. S. Anantaraman* for Appellant.

C. V. Anantakrishna Aiyar, N. Rama Aiyar and *K. R. Narayana Aiyar* for Respondents.

T. S. V.

Krishnan, Ramesam and Beasley, JJ. } S. A. No. 874 of 1924.
10th March, 1926.

Limitation Act, Art. 123—Applicability—Mohamedan heir—Suit for partition.

Where after the death of a Mohamedan owner, his heirs are in enjoyment as tenants-in-common, and thereafter one of them sues for partition, Art. 123 of the Limitation Act does not apply. 16 Mad. 61 (F. B.) ; 45 Bom. 519 followed.

B. Sitarama Rao for Appellant.

K. Y. Adiga and *K. P. Sarvothama Rao* for Respondents.

T. S. V.

Phillips and Madhavan Nair, JJ. } C. R. P. No. 1166 of 1925.
10th March, 1926.

Madras District Municipalities Act—Rules framed under R. 7 (1)—Election—No poll—Candidate deemed to be elected—Petition to question validity of election—If maintainable.

Where at a Municipal election, the nomination papers of some of the candidates having been rejected, there was only one valid nomination paper according to the Presiding officer and he was held elected under Rule 7 (1) of the Rules for the conduct of elections, an election petition does not lie to challenge the validity of the election. Distinction in the rules

between "declared to be elected" and "deemed to have been elected" emphasised. 47 M. L. J. 762 folld.

T. R. Ramachandra Aiyar and *S. R. Dikshit* for Petitioner.

T. M. Krishnaswami Aiyar and *S. Srinivasa Aiyar* for Respondent.

T. S. V.

Krishnan and Venkatasubba Rao, JJ.
11th March, 1926.

A. S. No. 61 *of* 1924.

Civil Procedure Code, S. 13 *(b)—Foreign judgment—Default of appearance—judgment if one given on the merits—Suit on foreign judgment—If maintainable in India.*

Their Lordships referred to a Full Bench the question whether a suit is maintainable in British India on a foreign judgment obtained on default of appearance. 47 Mad. 877; A. S. 144 and 145 of 1922 doubted; 40 Mad. 112 (P. C.); 45 Mad. 496 (P. C.) and English cases discussed.

A. Krishnaswami Aiyar and *E. Vinayaka Rao* for Appellant.

K. V. Krishnasami Aiyar and *N. Kunchithapadam Aiyar* for Respondents.

T. S. V.

Phillips and Madhavan Nair, JJ.
11th March, 1926.

C. M. S. A. No. 120 *of* 1923.

Limitation Act, Art. 182 *(5)—Step-in-aid of execution—What is—Application by debtor to have satisfaction entered up—Objection petition by creditor—If a step-in-aid.*

A decree-holder put in an application for transfer of his decree to another court and while it was pending the judgment debtor applied under O. 21, R. 2 to have satisfaction entered on the ground that the decree amount had been paid. Thereupon, the decree-holder put in an objection petition denying satisfaction and asking for the dismissal of the petition put in under O. 21, R. 2, Civil Procedure Code. *Held* the objection petition was in no sense in furtherance of execution and was not a step-in-aid within the meaning of Art. 182 (5); 45 Mad. 466; 12 L. W. 10; 23 Cal. 690 folld; the exact scope of a step-in-aid explained.

K. P. Ramakrishna Aiyar for Appellant.

K. R. Narayana Aiyar for Respondent.

T. S. V.

Wallace, J.
11th March, 1926.

Crl. Rev. Case No. 578 *of* 1925.

Criminal Procedure Code, S. 202—*Issue of notice—Legality of procedure.*

There is no warrant in the Code of Criminal Procedure for a Presidency Magistrate in the City of Madras issuing notice to the accused to appear before him to show cause why summons should not thereafter issue against him. The prevalence of such a practice for a long series of years cannot make it legal.

E. L. Ethiraj for Petitioner.

The Crown Prosecutor and *O. Thanikachelam Chetty* for Respondents.

T. S. V.

Phillips and Madhavan Nair, JJ.
11th March, 1926.

C. M. S. A. No. 134 *of* 1923.

Limitation Act, Art. 182 (5)—*Application for execution—Failure to file necessary papers within time fixed—Application for extension of time—If a step-in-aid of execution.*

An execution application filed in court was returned to the decree-holder and he was directed to file into court within a certain time certain necessary papers. This was not done within the time fixed, and some time later the decree holder applied for extension of time to file the papers. *Held* the application was not a step-in-aid of execution.

A. Viswanatha Aiyar for Appellant.

M. Patanjali Sastri for Respondent.

T. S. V.

The Chief Justice.
12th March, 1926.

C. R. P. No. 978 *of* 1924.

Limitation Act, S. 20—*Part payment of principal—Fact of payment—If to be in handwriting of person paying.*

His Lordship referred to a Full Bench the question whether in order to amount to an acknowledgment of liability the fact of part-payment of principal must appear in the handwriting of the person making the same, in cases where that person knows how to write, as held in I. L. R. 38 Mad. 438.

V. Ramaswami Ayyar for Petitioner.

T. V. Gopalasami Ayyangar for Respondent.

T. S. V.

Wallace, J.
8th March, 1926. } *C. R. P. No. 945 of 1923.*

Civil Procedure Code, Sch. II, para. 1—Contract to sell—Suit for specific performance by vendee—Vendor and subsequent purchaser impleaded—Reference to arbitration—Vendor not party to reference—Effect of—Award not binding.

In a suit by A. for specific performance of a contract to sell immoveable property and for damages against his vendor B and against C a subsequent purchaser from B, the Court on the application of A and C referred the matter in dispute to arbitration, B having been declared *ex parte*. The award went against A and was favourable to B and C. On objection taken by A held :

(*i*) that B was, on the date of the reference a party interested within the meaning of para. (1) of the Second Schedule to the Civil Procedure Code,

(*ii*) that inasmuch as he did not join in the application, the reference was without jurisdiction and the award was consequently void and inoperative. 42 Mad. 632 ; 48 M. L. J. 142 ; 22 L W. 395 ; followed : 44 M. L. J. 359 distinguished.

V. Govindarajachari for the Petitioner.

S. Subramania Sastri for the Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
10th March, 1926. } *C. M. A. No. 294 of 1925.*

Civil Procedure Code, Sch. II, para. 17—Reference out of Court—Three Arbitrators named—Award when binding—No provision as to majority award.

Where persons have agreed to refer their disputes to the Arbitration of 3 named persons out of Court, without providing in the agreement that in the event of disagreement the view of the Majority should prevail, the award will be binding only if it is unanimous. The Court is not entitled in making it a rule of Court under Sch. II, para. 17, Civil Procedure Code to make any such provision as to a majority award being binding, as it would be inconsistent with the terms of the reference. (1896) 1 L. B. 567 ; (1914) A. C. 651 ; 19 W. R. 47 applied, 17 Mad. 498 distinguished.

Ch. Raghava Rao for Appellant.

B. Somayya and *P. Bapiraju* for Respondent.

T. S. V.

N. R. C.

Philips and Madhavan Nair, JJ.
12*th March*, 1926. } C. M. A. No. 126 *of* 1924.

Execution —Pre-decretal arrangement—When can be pleaded in bar of—Arrangement to use the Machinery of Courts to file collusive suits and obtain false decrees to defraud a third party —Decree obtained—Third party not actually defrauded—If a party to the Arrangement can question the validity of the decree.

Where it was alleged by the 1st defendant that the decree sought to be executed against him was really the outcome of a collussive suit filed by the plaintiff with the consent of the 1st defendant in order to coerce the 2nd defendant to act according to the wishes of the 1st defendant, and it was held by the Court below that the agreement could not be pleaded in execution, *held* on appeal, the question was not so much whether the plea is available in execution but whether it is available at all; and that as such an arrangement was void as being opposed to public policy, the decree could not be vacated on the ground such an arrangement existed.

T. M. Krishnaswami Aiyar for *Alladi Krishnaswami Aiyar* and *P. Bapiraju* for the Appellant.

K. N. Rajagopal Sastri for *B. Satyanarayana* for the Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
12*th March*, 1926. } L. P. A. No. 129 *of* 1925.

Hindu Law—Adoption by widower—Adoptee if can inherit to relations of adoptive father's deceased wife.

Where a Hindu widower makes an adoption, his wife though dead at that time is in the eye of the law an adoptive mother and the adoptee can inherit the property of her relations on that basis. Texts and case law discussed. The decision reported in 48 M. L. J. 126 reversed.

C. V. Anantakrishna Aiyar for Appellants.

V. Govindarajachari for *A. Krishnasami Aiyar* for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
12*th March*, 1926. } L. P. A. No. 147 *of* 1925.

Madras District Municipalities Act (V of 1920), S 93 and Sch. IV, R. 18—Professional tax—Firm carrying on business as agent—Principal Office outside Municipality—Liability to tax.

In the case of a firm carrying on business within the local limits of a mofussil Municipality, but the principal office of the company is at Madras, the mofussil Municipality cannot levy professional tax on the firm. Scope of S. 93 and Rule 18 of Sch. IV considered.

K. Y. Adiga and *K. Sundara Rao* for Appellant.

R. N. Aiyangar instructed by Messrs. King and *Partridge* for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
17th March, 1926.

L. P. A. No. 145 *of* 1925.

Inam Religious service inam—Sale of—If valid even during the life time of alienor.

Quaere—Whether a sale of religious service inam lands is valid for the life time of the person who sells the same? 45 Mad. 620 doubted.

K. V. Sesha Aiyangar for *V. C. Seshachari* for Appellant.

K. Y. Adiga for Respondent.

T. S. V.

Devadoss and Waller, JJ.
18*th March,* 1926.

Crl. Appeal No. 632 *of* 1925.

Penal Code, S. 197—*Certificate contemplated by section.*

The accused who was the President of a First Class Bench Magistrate Court falsely certified that four persons swore before him to claim statements as to the death of a person who had insured his life, which statements where required by the rules of the company. *Held* he could not be convicted under S. 197, Indian Penal Code. The certificate contemplated by S. 197 is one required to be given by law and should admissible in evidence without further proof under S. 79 of the Evidence Act.

The Public Prosecutor (*J. C. Adam*) for the Crown.

Sydney Smith and *K. Srinivasa Rao* for Accused.

T. S. V.

Phillips and Madhavan Nair, JJ.
19th March, 1926.

L. P. A. No. 178 *of* 1925.

Civil Procedure Code, S. 105 (1) *and* (2), *O.* 7, *R.* 10 *and O.* 43, *R.* 1.—*Suit for possession—Service inam lands—Jurisdic-*

tion of Civil Court—Munsiff directing return of plaint—Appellate Court ordering remand—Order if appealable—Decree awarding possession—Propriety of remand order if open to attack—Error if affects decision of the case.

In a suit for possession of shroff service inam lands instituted in a District Munsiff's Court, the defendant raised the plea that under Madras Act III of 1895, the Civil Court had no jurisdiction to entertain the suit. The plea was accepted and the plaint return to be presented to the proper Court under O. 7, R. 10, Civil Procedure Code. This was however reversed in appeal and the suit remanded for trial on the merits. A decree for possession was passed and confirmed on appeal, but in second appeal the defendant again raised the contention that the Civil Courts had no jurisdiction, thus challenging the correctness of the remand order. *Held*, (1) the order of remand having been passed on appeal from an order under O. 7, R. 10 did not amount to a decree and was not further appealable, and hence S. 105 (2) was no bar to the defendant attacking the correctness of the order of remand. 28 I. C, 304 ; 33 All. 479 ; 27 Bom. L. R. 635 folld. ; (2) but S. 105 (1) which allows such an attack restricts it to cases where the error has affected the decision of the case on the merits, 47 M.L.J. 641 folld.; and (3) in order to decide if the correctness of the order of remand is open to attack in appeal, the Court has to consider the nature of the order in relation to the facts of the case. As the result of the order of remand in the present case is the trial of the suit and an adjudication of rights on the merits, S. 105 (1) would not apply and the propriety of the remand order was not open to attack.

Ch. Raghava Rao for Appellant.

V. Ramadoss for Respondent.

T. S. V.

Odgers, J.
24th February, 1926. } *S. A. No.* 1085 *of* 1923.

Registration, Act, S. 77—Scope of—Property not sufficiently described, Refusal to accept document for registration—Suit if lies.

Section 77 of the Registration Act comprises also a suit to set aside the order of the Registrar refusing registration on the ground that property was not sufficiently described under Section 21 of the Registration Act. The decision in 40 Mad. 759 (F. B.) is also applicable to a case of refusal to accept a document for registration on the ground that property is not sufficiently described. There is no distinction in substance between refusal to register a document and refusal to accept a document for registration under the Registration Act.

N. Chandrasekara Iyer for Appellant.

P. S. Narayanaswami Iyer for Respondent.

T. S. V.

Krishnan and Venkatasubba Rao, JJ.
17th March 1926. } *A. S. No.* 221 *of* 1922.

Civil Procedure Code, Ss. 92, 93—Scheme Suit—Sanction of Collector obtained—Addition of party—Fresh sanction when necessary—Test to apply.

Where during the pendency of a scheme suit instituted in the mofussil with the sanction of the District Collector under Ss. 92 and 93, Civil Procedure Code, new parties are sought to be impleaded, the question whether fresh sanction is necessary before the suit can be proceeded with depends upon whether the scope of the suit has been enlarged or altered by such addition. 12 L. W. 722 followed.

P. R. Ganapathy Aiyar for Appellants.

P. Satyanarayana Rao and *T. Ramachandra Rao* for Respondents.

T. S. V.

Wallace, J.
22nd March, 1926. } *C. R. P. No.* 70 *of* 1924.

Surety—Liability of—Arrest of judgment debtor—Surety undertaking to produce debtor—Protection order obtained—Effect of.

A judgment debtor who was arrested in execution was released on a surety giving a bond undertaking to pay the decree amount in case be failed to produce the debtor before the executing Court or the Official Receiver or the Insolvency Court whenever called upon to do so. The judgment debtor who had

been adjudged insolvent obtained a protection order from the Insolvency Court in respect of the decree debt in execution. *Held* it did not absolve the surety from producing the debtor when called upon to do so, and on default the bond could be enforced against him.

E. Vinayaka Rao for Petitioner.

T. M. Ramaswamy Aiyar for Respondent.

T. S. V.

Phillips and Madhavan Nair, JJ.
22nd March, 1926.

C. M. A. No. 115 *of* 1925.

Provincial Insolvency Act (*V of* 1920), *S.* 2 (*d*)—*Joint Hindu family—Father and sons—Insolvency of father—Official Receiver—What vests in.*

Where in a Hindu joint family consisting of father and sons, the father becomes insolvent, the power to dispose of the son's interest vests in the Official Receiver, though the sons' interest itself does not vest.

The definition of 'property' in S. 2 (*d*) is not exhaustive. The decisions in 46 Mad. 54 and 47 Mad. 462 are still good law, and have not been affected by the decision of Judicial Committee in 6 Lah. 1.

T. M. Krishnasami Aiyar and *T. M. Ramaswami Aiyar* for Appellant.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Respondent.

T. S. V.

Devadoss and Waller, JJ.
23rd March 1926.

C. M. A. No. 491 *of* 1923.

Probate and Administration Act, S. 69—*Caveat—Who can enter—Widow having a claim for maintenance from the estate—'Interest in the estate of the deceased"—Meaning of.*

On an application put in by a sole executor for probate of the will, the widow of a brother of the husband of the testatrix claiming a maintenance right is entitled to enter a caveat under S. 69 of the Probate and Administration Act. In order to decide if a person has an interest within the meaning of the section, the test to apply is to see if he can maintain a suit in respect of any portion of the property covered by the will. It is not necessary that he should claim through the testator at all. 17 Cal. 48; 34 Bom. 459 dissented from. Case law discussed.

Per Waller, J. The words "interested in the estate of the deceased" have the same meaning as "having or pretending

interest in the real estate affected by the will" in S. 61 of the English Court of Probate Act (20 and 21 Viet. C. 77).

B. Jagannatha Doss for Appellant.

T. A. Ananta Aiyar amiens curiae for Respondent.

T. S. V.

The Chief Justice. } *S. A. No.* 1352 *of* 1923.
24*th March* 1926. }

Limitation Act, Art. 139—*Applicability—Malabar lessee for term of years—Expiry of period—Suit for possession—Limitation if commences from expiry of lease—Right to improvements—Effect of.*

Where the period for which a lease was granted in Malabar has expired, limitation for a suit by the *jenmi* for possession does not begin to run under Art. 139 of the Limitation Act from the date on which the lease expired; the tenant being entitled to remain in possession under S. 5 of the Malabar compensation for Tenant's Improvements Act until his improvements have been paid for, limitation can commence to run only from that time.

T. S. Viswanatha Aiyar for Appellant.

B. Pocker and *K. P. Ramakrishna Aiyar* for Respondent.

T. S. V.

Krishnan, Ramesam and Beasley. JJ. } *O. S. A. No.* 5 *of* 1924.
24*th March*, 1926. }

Civil Procedure Code, O. 2, *R.* 3—*Multifariousness—Trustee of temple—Leases to different lessees at different times—One suit to set aside—If lies.*

Where a trustee of a temple granted various leases for terms of 99 years to different tenants at different times a suit to set aside all these leases in one suit is not bad for multifariousness. Case law discussed.

K. S. Krishnaswami Aiyangar for Appellant.

K. Krishnamachari and *V. Narasimha Aiyangar* for Respondents.

T. S. V.

Krishnan, J. } *C. R. P. No.* 984 *of* 1924.
24*th March*, 1926. }

Transfer of Property Act, S. 107—*Applicability—Right to cut and take barks—Period of* 5 *years fixed—Lease or License—If to be by registered instrument.*

Where a person grants to another the right to cut and remove *avaram* barks for a period of five years, it need not be

evidenced by writing registered. It amounts to only a license and not a lease. 20 Mad. 58 referred to.

G. Krishnaswami Aiyar for Petitioner.

S. Subramania Aiyar for Respondent.

T. S. V.

Krishnan, J.
25th March, 1926. } *S. A. No.* 1531 *of* 1923.

Malabar Law—Ottidar—Right of pre-emption—Grant of Kuzhi Kanom lease—Nature of.

A *jenmi* granted a *Kuzhikanom* lease to a third party of properties already outstanding on *otti.* The *jenmi* stipulated that out of the moneys advanced by the *Kuzhikanomdar* he would file a suit for redeeming the *otti* and then hand over possession to the lessee who would pay over the value of improvements to the *ottidar* and thereafter step into his shoes. The *ottidar* thereupon filed a suit to get a transfer of the rights of the *Kuzhikanomdar* on the ground that his right of pre-emption and to make further advances had been infringed by the grant of the *Kuzhikanom. Held* the latter was neither a transfer of the equity of redemption nor a document creating a further charge and hence the *ottidar's* rights having in no way been encroached upon, he was not entitled to a reconveyance.

K. P. Raman Menon for Appellant.

T. S. Narayanasami Aiyar for Respondent.

T. S. V.

Krishnan and Venkatasubba Rao, JJ.
26th March 1926. } *A. S. No.* 445 *of* 1922.

Limitation Act, Arts. 120, 124*—Mohant—Office—Succession to—Nomination—Suit for possession—Limitation.*

Where a person claiming to have become the *mohant* of a *mutt* by virtue of a nomination by the last holder, sues for possession, the suit does not fall under Art. 124 of the Limitation Act, but under Art. 120. The office of *Mohant* is not under such circumstances a hereditary office within the meaning of Art. 124, nor does the nomination amount to hereditary succession.

Per Venkatasubba Rao, J. Nomination of a *chela* by the previous head of the mutt is not analogous to the case of adoption. Case law referred to.

A. V. Visvanatha Sastry for *C. Padmanabha Aiyangar* for Appellant.

A. Krishnaswami Aiyar and *B. Jagannatha Doss* for Respondent.

T. S. V.

Wallace, J.
26th March, 1926. } *C. M. S. A. No. 93 of 1923.*

Malabar Law—Karnavan—Junior members also impleaded—Effect of—Representative character — Civil Procedure Code, O. 41, R. 4—Scope of.

In a suit by one Malabar Tarwad against another, the *Karnavan* and all the junior members of the latter were impleaded as parties. In the second appeal by the latter to the High Court one of the junior members was not impleaded at all, while the legal representatives of another were not brought on record. The defendants succeeded in second appeal, and in restitution proceedings, the question was raised whether the decree was not void in the absence of the parties omitted to be impleaded. *Held* the question was really whether they were necessary parties. If the *Karnavan* is on record, it is sufficient representation of the *tarwad,* and making the junior members *eo nomine* parties to the suit did not deprive the *Karnavan* of his representative capacity. The question is not whether he was impleaded as *Karnavan* but whether as a matter of fact he conducted the litigation on behalf of the *tarwad.* Case law dicussed.

Order 41, R. 4 can only apply where the fact of omission of the parties is brought to the notice of the Court, and it thereafter consciously decides to apply the rule 48 M. L. J. 601; 27 Bom. 284 doubted.

L. A. Govindaraghava Aiyar, P. S. Narayanasami Aiyar and *P. S. Ramachandra Aiyar,* for Appellant.

C. V. Anantakrishna Aiyar and *P. R. Ramakrishna Aiyar,* for Respondent.

T. S. V.

Madhavan Nair, J.
31st March, 1926. } *C. M. S. A. No. 46 of 1924.*

Civil Procedure Code, O. 21, R. 16, Proviso—Applicability—Decree against a number of persons—Transfer of decree—Death of one of the debtors—Transferee on heir—Effect of—Merger.

A decree for money passed against 3 persons and against the assets of a person in the hands of 2 others was transferred to a stranger and two years later one of the judgment-debtors died, leaving the transferee decree-holder as one of his heirs. When he sought to execute the decree, the other judgment-debtors resisted. *Held,* as the decree was one for payment of money under O. 21, R. 16 and the transferee was one of the heirs of a judgment-debtor, there was a merger of the interests

of creditor and debtor in the same person and under the second proviso to R. 16, the decree could not be executed.

S. R. Muthuswamy Aiyar, for Appellant.

P. N. Appusamy Aiyar, for Respondent.

T. S. V.

Odgers, J.
1st April, 1926. } *S. A. No.* 1163 *of* 1923.

Limitation Act, Arts. 134 *and* 144—*Alienation by trustee of temple —Suit for possession by succeeding* pujari—*Limitation.*

The trustee of a temple alienated temple properties more than 30 years before suit, by various transactions sales and mortgages resulting in decrees and execution sales. In a suit brought by a subsequent *pujari* trustee, a grandson of the alienor and son of an intermediate *pujari* to recover possession of the properties, *held* that adverse possession began to run only from the date of the death of the alienating trustee and hence a suit filed within 5 years of his death though more than 30 years after the alienation would be in time. 44 Mad. 831; 46 Mad. 751 considered; 48 M. L. J. 114; L. P. A. 158 of 1924 folld.

C. Veeraraghava Aiyar, for Appellant.

B. Sita Rama Rao, S. R. Muthusami Aiyar and *P. V. Krishnaswamy Aiyar*, for Respondents.

T. S. V.

Wallace, J.
1st April, 1926. } *C. R. P. No.* 22 *of* 1926.

Civil Procedure Code, S. 92—*Applicability—Suit for removal from management and for accounts—Sanction—Madras Religious Endowments Act (I of* 1925), *S.* 69—*Applicability.*

The plaintiff and the defendants created an endowment for the performance of certain services in connection with a temple. The plaintiff filed a suit praying for the removal of the 1st defendant from his self constituted position of manager, for an account, for framing a scheme and other reliefs. The 1st defendant raised a plea that the suit was bad for want of sanction under S. 92, Civil Procedure Code or of the consent of the Religious Endowments Board under S. 69 of Madras Act I of 1925. *Held*, S. 92, Civil Procedure Code applied only to suits brought in vindication of the rights of the public and where the plaintiff's grievance was only that he had been excluded from his rights of co-trusteeship, and on that basis asks for a declaration of his rights as co-trustee and for accounts, the suit does not fall

under S. 92, Civil Procedure Code and no sanction is necessary. 45 Mad. 113 folld.

Held, also that in spite of the passing of the Madras Religious Endowments Act the suit would be governed only by S. 92, as Act I of 1925 has nowhere provided for a suit of this kind. Scope of S. 69 of the Act considered.

S. Srinivasa Aiyangar and *W. S. Subramania Aiyar*, for Petitioner.

C. S. Venkatachariar and *D. Ramaswamy Aiyangar*, for Respondent.

T. S. V.

The Chief Justice.
6th April, 1926.

S. A. No. 1409 *of* 1923.

Hindu Law—Inheritance—Mitakshara school—Unchaste daughter—Rights of—Text of Brihaspati.

The text of Brihaspati denying rights of succession to an unchaste daughter has been incorporated into the Dayabaga, but not the Mitakshara. The specific inclusion of the prior part of the text, but not the portion denying rights of succession to an unchaste daughter is a clear indication that it was a deliberate omission on the part of the author of the Mitakshara. Unchastity therefore does not disqualify a Hindu daughter from her rights of inheritance in the Madras Presidency.

B. Jagannadha Doss, for Appellant.

K. N. Rajagopal Sastri for *Y. Suryanarayana*, for Respondent.

T. S. V.

Devadoss, J.
6th April, 1926.

S. A. No. 1550 *of* 1923.

Hindu Law—Will—Construction—" S. on attaining majority shall enjoy with absolute rights "—Estate if vested or contingent—Death of S—When a minor—Effect of.

A will by a Hindu testator contained the following clause. " My second daughter's son S. on his attaining majority shall enjoy with absolute rights enabling him to make gifts, sale, etc. " S. died when he was still a minor and his father sued as his heir for possession of the properties devised in favour of S. *Held*, on a construction of the will, S. took a vested interest and not merely a contingent estate and the suit was maintainable by his father. The use of the word அனுபவித்து கொள்கிறது as distinguished from அடைகிறது indicated a vested interest 28 Cal. 621 ; 4 Mad. 124 ; 8 Cal. 378 refd. to ; (1908) 2 Ch. 295 distd.

Construction of a Hindu will according to the ordinary motions of Hindu explained; scope of the exception to S. 21, T. P. Act discussed.

S. Subramania Aiyar, for Appellant.

S. Varadachariar, for Respondent.

T. S. V.

Krishnan and Venkatasubba Rao, JJ. 6th April, 1926. — *A. S. No.* 350 *of* 1922.

Malabar Law—Mortgage and lease back—Construction—Provision for redemption after one year—Covenants as to payment of revenue, etc.—Arrears of rent charged an equity of redemption—Suit by mortgagee—Recovery of arrears of rent—Limitation—Payment of Government Revenue by mortgagor—Effect of, on limitation.

In 1899, a usufructuary mortgage with a covenant to pay was executed in favour of the predecessors in title of the plaintiff with respect to the suit properties, and a lease back in favour of the mortgagors the very next day. Both the documents were registered on the same day. A period of one year was fixed, after which the mortgagors could redeem or the mortgagee see for their mortgage money and the mortgagee was to pay out of the income the Government Revenue and *michavaram* and appropriate the balance for interest on the mortgage amount. Though the preamble of the lease deed recited that it was for a year only, the recitals in the body of the document indicated otherwise. According to the lease deed arrears of rent were charged on the equity of redemption and a sum was advanced to the mortgagee lessor as *munpattom* for security of rent, and there was a provision for interest on arrears of rent. The mortgagors lessees were authorised to pay the Government Revenue and *michavaram* from out of the rent and the Government Revenue was being so paid. The mortgagee sued in 1920 for enforcing the mortgage treating the rent due under the lease as interest on the mortgage amount. *Held,* (1) the two documents could not be treated as parts of the same transaction; (2) under the lease deed, a charge had been created on the equity of redemption not only for the arrears of rent for one year but for all the years and hence rent for 12 years could be recovered; and (3) the payment of Government Revenue by the mortgagors lessees was sufficient to prevent the mortgage amount from getting statute barred.

S. 20 (2) of the Limitation Act construed.

B. Sitaram Rao and *A. Vasudeva Menon,* for Appellant.

K. P. M. Menon, and *P. Govinda Menon,* for Respondent.

T. S. V.

Spencer, Ramesam and Beasley, JJ. — C. R. P. No. 366 of 1924.
24th March, 1926.

Contract Act, S. 30—Chit fund—If a lottery or wagering contract—Subscriptions paid—Suit for recovery of—If maintainable.

The case reported as 50 M. L. J. (Notes of Recent Cases) p. 22 came for hearing before a Full Bench on the question whether the chit fund described therein was a lottery embodying a wagering contract. Their Lordships have called for a finding whether the stakeholder in the case kept an office inviting the public to join the chit fund and whether circumstances existed which would bring the case within the mischief of S. 294-A of the Penal Code. A finding that a chit fund is a lottery cannot dispose of the case; nor that it is a wagering contract conclude the matter, as the further question arises whether at least the subscriptions paid cannot be recovered under S. 65 of the Indian Contract Act. The Full Bench has not as yet expressed its opinion as to whether the chit fund is a lottery or constitutes a wagering contract.

A. V. Narayanaswami Aiyar for Petitioner.

S. R. Muthusamy Aiyar for Respondent.

T. S. V.

Wallace, J. — Crl. Rev. Case No. 75 of 1926.
26th March, 1926.

Criminal Procedure Code, S. 144—Order restraining a section of the community from conducting marriage processions—Public Street—Validity of.

An order of a Magistrate under S. 144, Criminal Procedure Code, restraining the *Nadars* of Odaipatti from taking marriage processions along the public streets, passed at the instance of *Gounders* is an abuse of the powers conferred under the section. The section is intended to restrain those who are threatening to interfere with a party's civil rights and not to restrain a party's lawful civil rights. Magistrates must ascertain with whom the civil rights lie and then try to maintain them.

V. L. Ethiraj and *S. Nataraja Nadar* for Petitioner.

K. S. Jayarama Aiyar and *The Public Prosecutor* for the Respondents.

T. S. V.

NRC

Spencer, J.
30th March, 1926.
C. R. P. No. 1009 *of* 1924.

Madras District Municipalities Act (V of 1920), *S.* 82 (2)—*Property tax—Calculation of—Gross annual rent—House in existence for part only of the year—Effect of.*

The assessment of property tax contemplated by S. 82 (2) of the Madras District Municipalities Act is only on the gross annual rent which can reasonably be expected to be realised, having regard to all the surrounding circumstances. Even if the house has not been in existence throughout the year, but only for some months, the Municipality is entitled to charge assessment on the basis of the gross annual rent.

T. Ramachandra Rao for Petitioner.

C. Sambasiva Rao for Respondent.

T. S. V.

The Chief Justice.
30th March, 1926.
C. M. P. No. 691 *of* 1926.

Presidency Small Cause Courts Act (XV of 1882), *Ch. VII and Ss.* 40, 47, 49—*Summary procedure—Application for recovery of possession—Suit based on title in City Civil Court—Transfer of summary chapter application to City Civil Court—High Court if competent to order—Madras City Civil Court Act, S.* 5 (2)—*Effect of.*

An application for recovery of possession filed in the Presidency Court of Small Causes under Ch. VII of the Presidency Small Cause Courts Act is not in the nature of a suit but only a summary proceeding and Ss. 40, 47 and 49 of the Act empowers the High Court only to take it on to its file. Where a suit based on title relating to the same premises is pending in the City Civil Court, the proceedings in the Small Cause Court cannot be transferred to the City Civil Court and S. 5 (2) of the Madras City Civil Court Act, which is an enactment of the Local Legislature, cannot be construed as conferring power on the City Court to dispose of a summary application filed under Ch. VII of Act XV of 1882.

Amendment of the Act suggested to facilitate such a transfer.

K. Narasimha Aiyar, and *T. K. Rangaswami Aiyar* for Petitioner.

P. Venkatramana Rao, and *V. Ganapathi* for Respondent.

T. S. V.

Odgers, J.
1st April, 1926.
S. A. No. 1254 *of* 1923.

Easements Act, S. 13—*Easement of necessity—Land sold as wet lands—Source of irrigation—Dispute as to—Sole source—Constructive trust—Purchaser with knowledge of prior contract to sell.*

Where a person sells lands to another on the basis of its being double crop wet lands and when the vendee seeks to irrigate it from the only source of irrigation which exists, *i. e.*, one belonging to the vendor denies, such right, an easement of necessity must be deemed to have passed to the vendee and he has a right to make use of the irrigation source for the lands purchased by him. 28 Mad. 495 ; 45 Bom. 80 ; (1902) 2 Ch 573 referred to.

A person who purchases land with knowledge of a prior agreement to sell by his vendor is a constructive trustee in the eye of the law.

B. Sitarama Rao for Appellant.

S. T. Srinivasagopalachari and *K. P. Sarvothama Rao* for Respondents.

T. S. V.

Devadoss and Waller, JJ.
6th April, 1926.
Crl. Rev. Case No. 711 *of* 1925.

Criminal Procedure Code, S. 476 —*Inquiry under—Nature of—Notice if to be issued—Right of cross-examining witnesses.*

The inquiry contemplated by S. 476 is only to enable the court to see if an offence appears to have been committed and if it is necessary that it should be enquired into. The court holds only a preliminary inquiry and the nature of the inquiry is left to the discretion of the court. Notice of the inquiry need not be issued, nor is a discussion on the merits of the case necessary or desirable. Objection cannot be taken to the enquiry on the ground that no opportunity was given to the accused to cross-examine witnesses. 34 All. 267 folld. ; 44 M. L. J. 74 dissented from.

K. S. Jayarama Aiyar, P. J. Kuppanna Rao and *V. Srinivasa-rangachariar,* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

T. S. V.

Phillips and Odgers, JJ. *8th April, 1926.* } S. *A. No.* 160 *of* 1926.

Madras Local Boards Act (*XIV of* 1920), *S.* 38—*Powers of Local Government—Nature and scope of—If excluded in matters relating to elections.*

At the elections to a Local Board, the President and Vice-President were candidates for election and hence another person was nominated to hold the elections. The President contested the seats in two different wards, and came out at the top of the polls in both the wards; but before the result was published, he chose one of the wards and the Election Officer acting under R. 32 framed by the Government declared the candidate in the other ward who got the next highest number of votes duly elected. The President however held this procedure improper and directed a fresh election to be held and the Local Government acting under S. 38 of the Madras Local Boards Act upheld the act of the President, and set aside the decision of the Election Officer. The candidate who had been declared elected, sued for a declaration that the action of the President and Local Government was illegal and *ultra vires* and for an injunction restraining the holding of a fresh election. *Held* the action was proper and the order of the Local Government under S. 38 was quite valid as the language of the section was general and the powers of the Government were not excluded in matters relating to elections.

T. R. Ramachandra Aiyar, K. Bashyam Aiyangar and *M. Rajagopalachari* for Appellant.

The Government Pleader, K. R. Venkatrama Aiyar and *A. Swaminatha Aiyar* for Respondents.

T. S. V.

The Chief Justice. *9th April, 1926.* } S. *A. No.* 1374 *of* 1923.

Transfer of Property Act, S. 95—*Applicability—Joint mortgagors—Agreement to pay by one—Failure to pay more than his own share—Payment by another—Suit for contribution—Charge if can be claimed.*

Where three persons jointly mortgaged a certain property and thereafter divided it among themselves, and agreed that one of them should pay off the mortgage debt, but on his paying only his share of the debt, the balance was paid by one of the other mortgagors, the latter can in a suit for breach of the agreement obtain only a personal decree, and not a charge on his property.

K. S. Krishnaswami Aiyangar and *R. Gopalasamy Aiyangar* for Appellant.

K. Krishnaswami Aiyangar and *P. R. Srinivasan* for Respondents.

T. S. V.

Krishnan and Venkatasubba Rao, JJ.
12th April, 1926.

A. S. No. 434 of 1926.

Lease—Assignee of portion in Malabar—If entitled to renewal—Renewal to be granted on terms which may be judged reasonable—If definite and certain for purposes of decreeing specific performance.

Their Lordships referred to a third Judge under S. 98, Civil Procedure Code, the following questions of law on which they differed. Whether an assignee of a portion only of properties granted on lease in Malabar is entitled to claim a renewal with respect to that portion and where the renewal is agreed to be granted on such terms as may be judged reasonable, whether the agreement is sufficiently clear and definite so as to be the basis of a claim for specific performance.

The Government Pleader for Appellant.

Nugent Grant and *O. T. Nambiar instructed by Messrs. King and Partridge* for Respondent.

T. S. V.

Phillips, Krishnan and Ramesam, JJ.
15th April, 1926.

C. R. P. No. 159 of 1926.

Madras Estates Land Act, S. 172—Board of Revenue—If a single member can direct revision of Record of Rights—Madras Board of Revenue Act (I of 1894), S. 2.

A single member of the Board of Revenue can validly take action under S. 172 of the Estates Land Act and he represents the Board under S. 2 of Madras Act I of 1894.

S. Varadachariar and *C. Sambasiva Rao* for Petitioner.

The Advocate General and *B. Jagannatha Doss* for Respondent.

T. S. V.

Spencer and Ramesam, JJ.
16th April, 1926.

A. S. No. 165 of 1923.

Land Acquisition Act, Ss. 6 (1) and 40—Public purpose—Inquiry by Government—Payment of compensation money into the Treasury—If makes it public revenue—Scheme of Act.

Where money is paid into a Government Treasury by the hand of a private person and after passing intact through the Treasury is paid as compensation money for lands compulsorily acquired, the money is not "part of the public revenues" within the meaning of S. 6 (1), as the Government has no disposing

power over the same. Duty of Government under S. 40 discussed.

If the provisions of the Land Acquisition Act are not complied with in a case, but are merely made a cloak for attempting to obtain a transfer of title in the guise of a public purpose, no title is conferred thereby 18 Calcutta 99 referred to.

S. Srinivasa Aiyangar and *V. Ramaswami Aiyar* for Appellant.

The Government Pleader for Respondent.

T. S. V.

Odgers, J.

16*th April*, 1926.

S. A. No. 1242 *of* 1923.

Civil Procedure Code, S. 47—*Bar of suit—Rival decree holders—Purchase by each in execution—Suit by one to declare decree of other invalid—If lies—Limitation Act, S.* 14—*Deduction of time—Lis pendens—Doctrine if applies.*

P obtained a money decree against *S* and purchased the suit property in execution. *Y* also obtained a money decree against *S* and purchased the same property. He filed a suit against *S* and his son for a declaration that he had obtained a valid title and after obtaining a decree sold the property to *Z*. *P* filed a suit against *S*, *Y* and *Z* for a declaration that the decree originally obtained by *Y* was collusive and fraudulent but the suit was dismissed under S. 42 as he was out of possession and yet did not sue for possession also. He then sued *S*, *Y* and *Z* afresh for declaration and possession. *Held* (1) S. 47, Civil Procedure Code, did not bar the suit as the obstruction to possession was only by *Y* and *Z*. *S* being only a *pro forma* party ; (2) the time during which the prior suit of *P* was pending could be deducted under S. 14, Limitation Act, as the dismissal under S. 42, Specific Relief Act, was akin to jurisdiction and (3) the purchase by *P* during the pendency of the suit by *Y* was not affected by *lis pendens* where he is only a benamidar for *S*.

K. Kameswara Rao for Appellant.

V. Suryanarayana for Respondent.

T. S. V.

Wallace, J.

16*th April*, 1926.

C. R. P. No. 38 *of* 1926.

Stamp Act, S. 36—*Admission of document for a particular purpose—If enures for all purposes—Promissory note executed for debt—If a discharge of debt—Note unenforcible—If original Cause of action revives.*

S. 36 of the Stamp Act is mandatory and where a document has been admitted in evidence, an objection as to its admissibility cannot be taken in appeal or revision. *Quaere* where the document has been admitted for a limited purpose, whether S. 36 is a bar to an objection being raised to its admissibility for any other purpose? 40 M. L. J. 479; 5 Mad 220; 13 Bom. 449; 49 M. L. J. 307 referred to.

Where a promissory note is taken for a contemporaneous debt, the execution of the note does not discharge the debt but only suspends the creditors ordinary remedy during the currency of the promissory note. If it is for an antecedent debt it operates only as a suspension of the ordinary remedy until it matures or is enforced. If it is unenforcible in law the ordinary remedy on the original debt is revived and becomes enforcible provided it is not barred by limitation, 34 I. C. 417; 7 Mad. 392; 14 I. A. 142; 36 All. 259; 45 Mad. 778 at 784 referred to.

K. Bashyam Aiyangar and *T. K. Ramaswami Aiyangar* for Petitioner.

A. V. Viswanatha Sastry, for Respondent.

T. S. V.

Kumaraswami Sastry, J.
16*th April*, 1926. } *S. A. No.* 1350 *of* 1923.

Hindu Law—Charity—Partition deed among brothers—Arrangement for conduct of—Construction.

Where in a partition deed between four brothers a charity founded by their father was arranged to be conducted by the eldest brother, and as regards its management after the eldest brother's death the words used in the partition deed were ஜேஷ்ட வரிசைக்கிரமமாய். *Held*, that the brothers had the right to manage one after another according to seniority and that it was not exclusively confined to the eldest member of the branch of the eldest brother alone. 27 Mad. 192 referred to.

C. S. Venkatachariar for the Appellant.

T. S. Ramaswami Aiyar with *Mr. V. Sundaram Iyer* for Respondents.

T. S. V.

Spencer and Ramesam, JJ.
16*th April*, 1926. } *A. S. No.* 84 *of* 1922.

Specific Relief Act, S. 42—Declaratory decree—Authority to adopt—Mere conferring of—Suit for declaration of invalidity—If maintainable prior to adoption—Minor if can confer authority.

Quaere whether the mere conferring of an authority to adopt by a Hindu on his widow, entitles a reversioner to sue for a declaration that the authority is invalid even before the authority is sought to be exercised? Conflict in case law discussed; 35 Mad. 592; 43 Mad. 1; 35 M. L. J. 144; 42 Mad. 699; 26 All. 238 referred to. Courts have always a discretion in the granting of such a declaration.

It is well settled that a Hindu minor is competent to empower his widow to make an adoption.

S. Doraiswami Aiyar and *P. C. Rajagopalachari* for Appellant.

K. S. Krishnaswami Aiyangar and *K. Kameswara Rao* for Respondents.

T. S. V.

Phillips and Madhavan Nair, JJ.
16th April, 1926. — *A. S. No.* 80 *of* 1924.

Transfer of Property Act, S. 58—*Mortgage—Rent accruing due after a certain fasli—Inclusion of—Effect—Assignment of an actionable claim.*

Where a mortgage was created over a certain property and in addition rents accruing due after a particular *fasli* were also made security for the repayment of the debt, so far as the rent is concerned it amounts to an assignment of an actionable claim as the rent falls due.

S. Varadachari and *T. M. Ramaswami Aiyar* for Appellants.

C. V. Anantakrishna Aiyar and *K. Bashyam Aiyangar* for Respondents.

T. S. V.

Wallace, J.
19th April, 1926. — *C. R. P. No.* 866 *of* 1925.

Promissory note—Suit on—Plea that payee is a partnership—If open.

In a suit on a promissory note it is not open to the defendant to plead that the person whose name appears on the face of the note is not the real payee, but a partnership of which he is a partner.

S. Jagadisa Aiyar for Petitioner.

B. C. Seshachela Aiyar for Respondent.

T. S. V.

Phillips, J.
16th April, 1926. } C. R. P. No. 1051 of 1924.

Contract—Municipal toll—Road rendered unfit for traffic on account of rains—Suit for pro rata *reduction—If maintainable.*

A municipal toll contractor who had been allowed to collect tolls over a road in consideration of his paying a certain sum to the Municipality was prevented from collecting tolls for some days on account of the road becoming unfit for vehicular traffic due to the heavy rains which fell. He sued the Municipality for getting a *pro rata* reduction of his contract amount. *Held*, he was not entitled to claim it, as it was due purely to an act of God and the contract never became incapable of performance. (1902) 2 K. B. 740 ; (1918) 1 K. B. 544 ; 86 I. C. 362 referred to.

V. Balaraman and *E. R. Krishnan* for Petitioner.

S. Ranganatha Aiyar for Respondent.

T. S. V.

Waller and Madhavan Nair, JJ.
20th April, 1926. } Ref. Case No. 3 of 1926.

Madras District Municipalities Act (V of 1920)—Rules for the decision of disputes as to validity of elections, Rr. 6, 11—Election Judge if competent to refer question of law to High Court—Civil Procedure Code—Applicability—Opinion of Judge to govern.

A Judge trying an election petition under the Rules framed under the Madras District Municipalities Act has no power to refer a question of law under O. 46, C.P. Code, for the opinion of the High Court. Under Rule 6 of the Rules for the decision of disputes as to the validity of elections, framed by the Madras Government, the provisions of the Civil Procedure Code are attracted only to the extent they relate to the procedure at the election inquiry and not otherwise. A reference is also incompetent because under R. 11, it is " the opinion of the Judge " which has to dispose of the petition and the opinion of some other tribunal is not contemplated under the rule.

T. M. Krishnaswami Aiyar and *P. N. Appusami Aiyar* for Petitioner.

F. S. Vaz for Respondent.

T. S. V.

N R C

Spencer, Krishnan and Beasley, JJ.
21st April, 1926. } *Ref. Case No.* 19 *of* 1925.

Madras Stamp Amendment Act (*VI of* 1922), *Schedule I-A, No.* 33—*Mortgage deed—Possession given—What amounts to—Clause for sale or taking possession on default—Effect of.*

A mortgage deed provided that the mortgagor was to remain in possession and there followed a clause that if default was made in payment of the amount in certain instalments, the mortgagee could enter into possession. The question arose whether the latter clause amounted "an agreement to give possession" within the meaning of Art. 33 (*a*) or (*b*) of the Madras Stamp Act: *Held*, it was only a subsidiary agreement which was merely conditional on certain events happening and as it might never happen at all, possession cannot be said to have been given or agreed to be given by mortgagor within the meaning of Art. 33 (*a*), and hence the deed has to be stamped under Art. 33 (*b*). 10 Cal. 274; 8 Bom. 310 referred to.

The Advocate-General instructed by the Government Solicitor for the Crown.

P. V. Rangaram for the opposite party.

T. S. V.

Phillips and Odgers, JJ.
21st April, 1926. } *S. A. No.* 576 *of* 1923.

Easements Act, S. 13—*Easement of necessity—Right of way—Patta lands—Easement when exists.*

Per *Odgers, J.*—Where a portion of a way lies on *patta* lands and the owner of the dominant tenement has acquired a right of way over that portion, he having no other access to his property as the surrounding lands belonged to the Government, a right of way as an easement of necessity over the Government land is acquired.

Per *Phillips, J.*—Where the Government is not a party to the suit and there was nothing to show that they were not willing to admit a right of way over their land, and a *darkhast* grant of part of the land contained a reservation which could be construed as an admission of a right of way, the owner of the dominant tenement is entitled to a right of way over the land.

K. Y. Adiga for Appellants.

B. Sitarama Rao for Respondent.

T. S. V.

Spencer and Ramesam, JJ.
22nd April, 1926. } *A. S. No.* 351 *of* 1923.

Pensions Act (XXIII of 1871), *S.4—Scope of—Unenfranchised personal inam lands—Suit for partition and possession—If barred in civil court—Inam Rules Object of—Alienation of lands—Validity of—Rights of Government—Resumption.*

S. 4 of the Pensions Act applies only to grant of land revenue and not a grant of the land itself. A suit by a sharer for partition and possession of unenfranchised personal inam lands is maintainable in a civil court and S. 4 does not bar civil courts from taking cognizance of such a suit. 7 Mad. 191; 21 Mad. 310 at 320; 27 M. L. J. 618; 1 Bom. 78; 29 Bom. 489 folld.; 12 Mad. 98 and 23 M. L. J. 687 doubted.

The object of R. 5 (3) of the Inam Rules passed on 11th October, 1859, is to protect the interests of the Government. An alienation of such *inam* lands is not void but inoperative as against the Government; but it is not open to others to question the alienation. 44 Mad. 632; (1911) M.W.N. 384; 3 L. W. 519 followed. So long as lineal heirs of the grantee remain, the Government has no right to resume and the property descends like ordinary property.

T. M. Krishnaswami Aiyar and *K. Sankara Sastry* for Appellants.

The Advocate-General and *M. S. Venkatrama Aiyar* for Respondents.

T. S. V.

Wallace, J.
23rd April, 1926. } *C. M. S. A. No.* 104 *of* 1924.

Civil Procedure Code, S. 47*—Appeal—Question between rival decree-holders—Money realised on attachment—Application by another creditor to draw out—Procedure—Lien of prior decree-holder—When lost.*

A obtained a decree against *B* and in execution attached certain property. *B* pleaded satisfaction out of Court, and after depositing the decree amount in Court applied for getting satisfaction recorded. *B's* petition was allowed and *A* appealed against the order, the money meanwhile remaining in Court deposit. Pending the appeal *C*, another creditor of *B*, obtained a decree and applied for payment out of the moeny in Court deposit under the Civil Rules of Practice, impleading *A* as a party but not *B*. In the meantime *A* succeeded in his appeal,

and the petition of *C* was dismissed on the ground that the money throughout remained to the credit of *A*; but this order was reversed on appeal at the instance of *C*. *Held*, on second appeal, (1) the order dismissing the petition of *C* was not appealable at all, as it was an order between rival decree-holders only, the judgment-debtor *B* not being even a party thereto. (1922) M. W. N. 184; 9 L. W. 32 referred to; (2) *C* had no *locus standi* to apply for the money in Court deposit, as the proper procedure for him should have been to put in an execution application and get the money in Court deposit transferred to the credit of his suit. 46 Mad. 506 referred to; and (3) throughout the proceedings *A* retained his lien over the money. 41 Mad. 1053 referred to.

K. S. Ramabhadra Aiyar for Appellant.

K. Rajah Aiyar for Respondent.

T. S. V.

The Chief Justice, Krishnan and Beasley, JJ. *23rd April,* 1926 — *Ref. Case No.* 4 *of* 1924.

Income-tax Act (XI of 1922), *S.* 10 (2)—*Deduction for purposes of income-tax—Milling factory—Lease allowed under Memorandum of Association—Wear and tear—Partly to be borne by lessee and partly by lessor—Claim of deduction by lessor.*

A factory for milling rice having been established, under the Memorandum of Association, the same was let out to a lessee. Under the terms of the lease deed, part of the wear and tear was to be borne by the lessor and part by the lessee. When the lessor was assessed to income-tax, he claimed deduction in respect of the depreciation due to wear and tear. *Held*, the deduction should be allowed as it was in respect of a business carried on by him within the meaning of S. 10 of the Income-tax Act.

M. Patanjali Sastri for the Commissioner of Income-tax.

Ch. Raghava Rao and *A. Sundaram Aiyar* for Respondents.

T. S. V.

Phillips and Madhavan Nair, JJ. 23*rd April*, 1926. } *A. S. No.* 177 *of* 1921.

Inam—Grant of—Presumption—Effect of recent decisions.

There is no presumption in the case of the grant of an inam that both the melvaram and kudivaram were granted or that only the melvaram was granted. Each case must be decided on its own facts. The decision of the P. C. in 47 Mad. 337 is not in conflict with the earlier decision of the P. C. in 45 Mad. 586. 47 Mad. 337 is explainable on its special facts.

49 M. L. J. 602 approved.

48 M. L. J. 654 ; 48 M. L. J. 701 ; 20 L. W. 478 ; 1924 M. W. N. 555 referred to.

The Advocate-General, A. Krishnaswami Iyer, L. S. Veeraraghava Iyer, K. S. Sankara Iyer and *V. Govindarajachari* for the Appellant.

P. Venkataramana Rao, P. Chenchiah and *K. Kameswara Rao* for the Respondents.

T. S. V.

Krishnan, Ramesam & Venkatasubba Rao, JJ. 26*th April*, 1926. } *C. M. A. No.* 39 *of* 1925.

Provincial Insolvency Act (*V of* 1920), *Ss.* 2 (*d*) *and* 28 (2)—*Hindu joint family—Father adjudicated insolvent—What rests in Official Receiver—Shares of sons—Power to sell for debts not illegal or immoral—Death of father—Effect of.*

On the adjudication of a Hindu father as insolvent, the shares of his sons do not vest in the Official Receiver, but the latter can sell the shares of the sons also for the purpose of discharging such of the father's debts as are not tainted with illegality or immorality. In such a case the Receiver is only exercising the conditional power of a Hindu father to sell his son's shares. The decision of the Judicial Committee in 6 Lah. 1, considered and its scope explained ; the language in the Presidency Towns Insolvency Act and Provincial Insolvency Act adverted to.

Held also the power of the Official Receiver to sell the shares of the sons does not come to an end with the death of the father ; nature of such a power explained.

T. Rangachariar and *K. Narasimha Aiyangar* for Appellant.

S. Varadachari and *T. M. Krishnaswami Aiyar* for Respondent.

T. S. V.

N R C

Ramesam and Venkatasubba Rao, JJ.
26th April, 1926.

S. A. No. 708 of 1923.

Hindu Law—Adoption—Southern India—Authority to adopt—If can be inferred from acts and circumstances—Giving and taken done by husband—Dattahomam—*Performance by widow—Validity of adoption.*

A Hindu boy was taken from his native village to another place with a view of being given in adoption to another ; the terms were settled, and an auspicious day fixed for the ceremony, but before the actual date the adoptive father died. The boy was later taken in adoption by the widow. *Held* under the circumstances, a court can infer an authority to adopt and the adoption is valid. The " express consent " referred to by the Privy Council in 12 M. I. A. 397 as necessary to validate an adoption by a Hindu widow in Southern India is as contrasted with the other schools of Hindu law and means only formal consent. There is nothing in Hindu Law to prevent its being inferred from acts and conduct.

Where a Hindu in his life time takes a boy in adoption, thus completing ' the giving and the taking ', and dies subsequently, his widow can perform the *dattahomam* and the adoption would be perfectly valid. 7 Mad. 548 ; 21 Mad. 497 followed.

G. Lakshmanna for Appellant,

B. Satyanarayana for Respondent.

T. S. V.

Wallace, J.
26th April, 1926.

Crl. Rev. C. No. 700 of 1925.

Criminal Procedure Code, S. 562—Juvenile offender—Conviction under Ss. 457 and 380, I. P. C.—Sentence to be imposed—Madras Children's Act, S. 27—Applicability.

Where a young person 14 years of age was convicted of offences under Ss. 457 and 380, Indian Penal Code, and the Sessions Judge dealing with the offender under S. 27 of the Madras Children's Act imposed a fine on the father of the boy.

Held, that the offender should have been dealt with under S 562, Criminal Procedure Code, and that the proper order to be passed was to release him on probation of good conduct with sureties for his good behaviour,

E. Krishnamurthi for Accused.

The Public Prosecutor for the Crown.

T. S. V.

Wallace, J.
29th April, 1926.
C. R. P. No. 37 *of* 1926.

Madras Local Boards Act, Ss. 56 (1) (*h*) *and* 57 (3)—*Scope of—Vaccancy—Declaration of.*

S. 56 (1) (*h*) of the Local Boards Act is imperative and a member who fails for 3 consecutive months to attend the meetings of a Taluq Board ceases to be a member. S. 57 (3) is only an enabling provision which validates intention acts, just as S. 35 does. Where a President of a Taluq Board ceases to be a member of absenting himself for 3 months under S. 56 (1) (*h*), he must be deemed to have vacated his Presidentship also thereafter. Scope of the High Court's powers of interference in revision adverted to.

T. R. Ramachandra Aiyar and *K. S. Venkatrama Aiyar* for Petitioner.

T. M. Krishnaswami Aiyar, for Respondent.

T. S. V.

Devadoss and Waller, JJ.
29th April, 1926.
Crl. Appeal No. 41 *of* 1925.

Criminal Procedure Code, S. 423 (2)—*Verdict of jury—Charge to jury—Failure to explain elements of offence—When verdict can be set aside.*

The verdict of a jury can be set aside an appeal only when it is erroneous. The Judge has to explain to the jury the elements of the offence charged, but mere failure to explain will not justify a verdict being set aside unless it has led to an erroneous verdict 30 Mad. 44; 6 M. L. T. 324; 25 Cal. 711 referred to.

B. Somayya for Appellant.

The Public Prosecutor for the Crown.

T. S. V.

Phillips and Odgers, JJ.
29th April, 1926.
A. S. No. 28 *of* 1921.

Hindu Law—Widow—Alienation—Gift for pious and charitable purposes—Gift at Godavary and Krishna Pushkarams—Gift to a School—Validity—Essential conditions—Extent of property.

A Hindu widow is entitled to make a gift of a small portion of her husband's estate on religious occasions for the spiritual benefit of her deceased husband. But for the gifts to be valid it must be proved that the occasions existed and were

in fact availed of for making the gifts. Mere recitals in gift deeds that the alienations were for *Pushkarams* without evidence *aliunde* to show that the widow went to the banks of the Godavary and Krishna and there performed the acts of gift on *Pushkaram* occasions *held* insufficient to support the alienations. Where there was a series of such gifts alleged to have been made at the same time, each in itself comprising a reasonable portion of the estate, but all together amounting to a large extent, *held* all the gifts were bad. A gift of land by a Hindu widow to an elementary school though a charitable act *held* invalid on the ground it did not conduce to the husband's spiritual benefit. 34 Mad. 288 and 44 All. 503, (P. C.) Distinguished. 43 Cal. 574 Referred to.

C. V. Anantakrishna Aiyar, C. Sambasiva Rao and *K. N. Rajagopal Sastri* for the Appellant.

S. Varadachariar and *Ch. Raghava Rao* for Respondents.

The Chief Justice, Devadoss and Wallace, JJ.
29th April, 1926.

Crl. Rev. Case No. 790 of 1925.

Criminal Procedure Code, Ss. 202, 203, 436—*Notice to accused under S.* 202—*Practice—Legality of—Dismissal of complaint—If amounts to a discharge—Action taken under S.* 436—*Notice to accused—If necessary.*

The practice of giving notice to accused persons under S. 202 is not illegal, but it is highly undesirable and should be put a stop to. A Magistrate should not compel the accused to appear unless there is in his opinion sufficient grounds for the prosecution. Judgment of *Wallace, J.* in Cr. R. Case 578 of 1925 followed.

The dismissal of a complaint under S. 203 does not amount to a discharge and when action upon it under S. 436 and further enquiry ordered, notice to the accused is not necessary. 47 All. 402 followed.

K. Narasimha Aiyar for petitioner.

The Public Prosecutor, N. A. Krishna Aiyar and *R. Viswanatha Sastri* for Respondents.

T. S. V.

[END OF VOLUME L.]